KENTUCKY BABE

A PLANTATION LULLABY

SONG	50
SCHOTTISCHE (Piano) .	40
BANJO SOLO . . .	30
2 BANJOS . . .	30
BANJO AND PIANO .	40
2 BANJOS AND PIANO	40
MANDOLIN AND GUITAR	25
2 MANDOLINS AND GUITAR	35
MANDOLIN AND PIANO	35
2 MANDOLINS AND PIANO	40

WORDS BY
RICHARD HENRY BUCK.

MUSIC BY
ADAM GEIBEL.

WHITE-SMITH MUSIC PUBLISHING CO.
BOSTON NEW YORK CHICAGO

COMPANION TO "KENTUCKY BABE"

"LITTLE COTTON DOLLY"

SUNG BY
ISADORE RUSH

PLANTATION SONG.

Price 50¢

WORDS BY
RICHARD HENRY BUCK

MUSIC BY
ADAM GEIBEL

AUTHORS OF THE CELEBRATED PLANTATION SONG —
"KENTUCKY BABE"

WHITE-SMITH MUSIC PUBLISHING CO.
BOSTON · NEW YORK · CHICAGO
LONDON: CHARLES SHEARD & CO.

October 15, 1907.

John J. O'Connell, Esq.,

New York City.

Dear Sir:-

I send you by express, today, two copies of the printed record in in cases of White-Smith Music Publishing Co., vs Apollo Co., Nos. 110-11, Oct. Term, 1907, and I have turned over to the printers the $10.00 in currency left with me by you yesterday in payment of their charge for said copies.

Yours truly,

James H. McKenney

Clerk, Supreme Court, U.S.

per H.H.M.

Sent Oct 15.

October 18, 1907.

C. S. Burton, Esq.,

Chicago, Ill.

Dear Sir:-

When you were here on the 14th inst., you will recall that you handed me original motion papers and affidavits in cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, for filing. On examining these papers, I find that there is no original motion in case No. 110. The original motion in the papers is in No. 111, only. Some of the affidavits refer to case No. 110, and some to case No. 111, and I assume that you have an original motion in No. 110. If so, please forward it to me at once for the files.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.

per

BURTON & BURTON,
ATTORNEYS,
SUITE 1410 MARQUETTE BUILDING,
CHICAGO.

Cable Address, Burbur, Chicago.

C. S. BURTON
E. F. BURTON

PATENT
Tel.

110
2038

October 21, 1907.

Chas. S. Burton, Esq.,

Chicago, Ill.

Dear Sir:-

Yours of the 17th inst., also, twenty-five printed copies each of your brief on motion and affidavits in cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, duly received, and filed.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.

per A.L.M.

J.S.A.

BURTON & BURTON,
ATTORNEYS,
SUITE 1410 MARQUETTE BUILDING,
CHICAGO.

PATENT LAW A SPECIALTY.
Tel. Central 1651.

Cable Address, Burbur, Chicago.

110 & 111
2038

Chicago, Oct.

Clerk, Supreme Court of the United States,

Washington, D. C.

Honorable Sir:-

I am forwarding by this mail, in two packag
twelve copies of Brief in Support of Motion to Dismiss, in s
of White-Smith Music Publishing Company vs. Apollo, Nos. 110 a
111, October calendar. The remainder of the twenty-five copies
required I am sending by express. Probably both will arrive
in time, but I am sending the smaller quantity by mail as be-
ing more certain of prompt delivery.

Respectfully,

Chas. D. Burton

J.S.A.

110 111

March 27, 1908.

William Parkin, Esq.,

Clerk, U.S. C.C. of Appeals,

New York City.

Dear Sir:-

Mandates in the two cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, have been issued, addressed to the Circuit Court for the Southern District of New York. I enclose certified copies of the decrees of this Court in said cases for your files.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.

Per E.M.

March 28, 1908.

Gifford & Bull, Esqs.,

New York City.

Gentlemen:-

Mandates and check for amount of taxed attorney fees in cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, go by this mail to Wilcox & Brodek, of your city.

I enclose receipted bills for costs in said cases, amounting to $1,453.90; also my check No. 12989 on the National Bank of Washington to your order for $31.10, it being balance of deposits amounting to $1,485.00 made to secure costs.

Please acknowledge receipt.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.

per

145390

March 26, 1908.

Wilcox & Brodek, Esqs.,

New York City.

Gentlemen:-

As heretofore requested by Mr. Charles S. Burton, I enclose the mandates in cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, and as all costs in this court have been paid by appellant, I also enclose my check No. 12990 on the National Bank of Washington to your order for $40.00, it being the amount of the taxed attorney fees, $20. in each case. Please acknowledge receipt.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.

per

127

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2038

March 23, 1908.

Albert H. Walker, Esq.,

New York City.

Dear Sir:-

I am in receipt of my letter to you of the 27th ult., and your check to my order for $4.00 and have credited the amount of the check in payment of fee for copy of opinion, heretofore furnished you, in cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.

per

Albert H. Walker
Counsellor at Law
110
202

February 27, 1908.

Albert H. Walker, Esq.,
New York City.

Dear Sir:-

As requested by yours of the 24th inst., I enclose copy of opinion in cases of White-Smith Co. v. Apollo Co., Nos. 110-11 Oct. Term, 1907, which has just been printed. The fee for same, $4.00, please remit.

Yours truly,

Jas. H. McKenney
Clerk, Supreme Court, U.S.
per

$4.00

Supreme Court of the United States.

Nos. 110 & 111, October Term, 1907.

White Smith Music Publishing Co.,
Appellant,

vs.

Apollo Company.

On consideration of the motions of The Connorized Music Company and Victor Herbert for leave to be made parties to these cases, for leave to file briefs and to make oral arguments herein,

It is now here ordered by the Court that leave be, and the same is hereby granted Counsel for the above-named parties to file briefs herein as amicii curiae.

It is further ordered that the motions for leave to be made parties and to make oral arguments be, and the same are hereby, denied.

Per Mr. Chief Justice Fuller.
October 21, 1907.

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JOHN J. O'CONNELL.
COUNSELLOR AT LAW,
31 NASSAU STREET.

TELEPHONE 2273 CORTLANDT.

NEW YORK, February 28th, 1908.

February 29, 1908.

J. J. O'Connell, Esq.,
New York City.

Dear Sir:-

Your favor of the 28th inst., received, and I regret very much that owing to the limited number of copies of opinions that are printed, I cannot fully comply with your request as to that in the case of White-Smith Co. v. Apollo Co., Nos 110-11, Oct. Term, 1907. I have done the best I could, however, and send you three additional copies by same mail.

Very truly yours,

James D. Maher
Deputy Clerk.

BURTON & BURTON,
ATTORNEYS,
SUITE 1410 MARQUETTE BUILDING,
CHICAGO.

PATENT LAW A SPECIALTY.
Tel. Central 1651.

Cable Address, Burbur, Chicago.

C. S. BURTON
E. F. BURTON

110
203

Chicago, March 6, 1908.

March 6, 1908

Chas. S. Burton, Esq.,

Chicago, Ill.

Dear Sir:-

Yours of the 4th inst., and check to my order for $4.00, duly received, and I have credited the amount of the check in payment of fee for copy of opinion, heretofore furnished you, in cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907.

The mandates in above cases cannot issue until after the expiration of thirty days from February 24, 1908. I have made a memorandum to send these mandates to Wilcox & Brodek, 320 Broadway, New York City, as soon as they can issue.

The cost of printing briefs of counsel in cases in this Court is not taxable as part of the costs therein. The only cost which can be taxed for appellee in the above cases is the taxed attorney fee of $20.00 in each case. The costs in the cases have not yet been taxed.

Yours truly,

James H. McKenney
Clerk, Supreme Court, U.S.
per

Chas. S. Burton

BURTON & BURTON,
ATTORNEYS,
SUITE 1410 MARQUETTE BUILDING,
CHICAGO.
PATENT LAW A SPECIALTY.
Tel. Central 1651.

Cable Address, Burbur, Chicago.

110
2038

Chicago, [illegible]

Mr. James H. McKenney,

Clerk of the Supreme Court of the United Sta

Washington, D. C.

Dear Sir:-

With thanks for forwarding of copy of opinion in case of White-Smith Music Publishing Co. vs. Apollo Company, Nos. 110 and 111, October Term, 1907, we beg to enclose herewith check, $4.00, for the same.

Am I correct in understanding that it is the practice to furnish to the counsel of the successful party the mandate to be filed in the court below pursuant to the decision of the Supreme Court, and if this is the practice, will you kindly forward such mandate to Messrs. Wilcox & Brodek, Solicitors of Record, 220 Broadway, advising me of the fee, which I will remit.

Will you also give me memorandum of the costs taxed in the Supreme Court upon these appeals.

Also I beg to inquire whether the expense of printing briefs is a taxable cost, and if there are other items of appellee's expenses which are so taxable upon proper showing of the same.

Thanking you in advance for the information above desired, I am,

Very respectfully yours,

Chas. H. Burton

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September 29, 1913.

Simpson, Thacher & Bartlett, Esqs.,

New York City.

Gentlemen:-

Replying to your letter of the 27th instant, in reference to the cases of White-Smith Music Publishing Co., vs. Apollo Company, which were Nos. 110 and 111, of October Term, 1907, I beg to say that an examination of the transcript in these cases shows that the date of final decrees in the Circuit Court of Appeals was June 5th, 1906. The petition for writs of certiorari were filed in this Court November 7th, 1907, and were granted at the time the cases were decided, February 24th, 1908.

Yours truly,

JAMES H. McKENNEY,

Clerk, Supreme Court, U. S.

PER _____ Ass't.

Filed
Nov 7. 1907

110-07
20-62
111-07
20383

SIMPSON, THACHER & BARTLETT,

ATTORNEYS AND COUNSELLORS AT LAW,

62 CEDAR STREET, NEW YORK.

JOHN W. SIMPSON.
THOMAS THACHER.
PHILIP G. BARTLETT.
ALFRED B. THACHER.
JULIUS F. WORKUM.
DWIGHT W. MORROW.
CHARLES B. EDDY.
GRAHAM SUMNER.
NIEL A. WEATHERBY.

September 27, 1913.

Clerk, Supreme Court of the United States,
Washington, D. C.

Dear Sir:

We are unable to obtain access here to the record in White-Smith Music Publishing Co. v. Apollo Co., 209 U. S., decided February 24, 1908. We are anxious to learn the date of the final decree of the Circuit Court of Appeals in that case and the date of the petition for certiorari. If you can give us this information we will be grateful.

5th June 1908

Yours very truly,

Simpson, Thacher & Bartlett

Filed
Nov 7. 1907

Supreme Court of the United States,

No. 110, October Term, 1907.

White-Smith Music Publishing Company, Petitioner,

vs.

Apollo Company.

On Petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Second Circuit, and of the argument of counsel thereupon had, as well in support of as against the same, It is now here ordered by the Court that said petition be, and the same is hereby, granted, the record on appeal to stand as a return to the writ.

Per Mr. Justice Day.

February 24, 1908.

Supreme Court of the United States,

No. 110, October Term, 1907.

White-Smith Music Publishing Company, Appellant,

vs.

Apollo Company.

Appeal and writ of certiorari to from the United States Circuit Court of Appeals for the Second Circuit.

This cause came on to be heard on the transcript of the record from the United States Circuit Court of Appeals for the Second Circuit, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, affirmed with costs; and that this cause be, and the same is hereby, remanded to the Circuit Court of the United States for the Southern District of New York.

per Mr. Justice Day

February 3rd, 1908

vs.

APOLLO COMPANY.

No. 110.

WHITE-SMITH MUSIC PUBLISHING COMPANY,

vs.

APOLLO COMPANY.

No. 111.

To Livingston Gifford, counsel for the appellant in the above entitled cases.

Please take notice that on Monday, October 14, 1907, at noon, or as soon thereafter on that day or the next day as counsel can be heard, I shall present to the Supreme Court of the United States, in its court-room in Washington, D. C., a petition of the Connorized Music Company for permission to file a brief and also to make an oral argument on the side of the appellee in the above entitled cases, and that a copy of said petition is herewith served upon you.

Albert H. C. Walker

Counsel for the Petitioner.

Service of the foregoing notice and of the copy of the petition mentioned therein is hereby acknowledged this eleventh day of October, nineteen hundred and seven.

Livingston Gifford

Counsel for the Appellant.

COMPANY,

vs.

APOLLO COMPANY.

No. 110.

WHITE-SMITH MUSIC PUBLISHING COMPANY,

vs.

APOLLO COMPANY.

No. 111.

Albert H. Walker, being duly sworn, deposes and says, that on Thursday, October 10, 1907, he personally deposited in the United States mail, directed to Charles S. Burton, at his office in Chicago, Illinois, a copy of the accompanying petition of the Connorized Music Company, for permission to file a brief, and also to make an oral argument on the side of the appellee, in the Supreme Court in the two cases of the White-Smith Music Publishing Company, vs. the Apollo Company, Nos. 110 and 111, and that the copy of the petition which was thus mailed to said Burton, was attached to a notice in writing stating that on Monday, October 14, 1907, at noon, or as soon thereafter as counsel can be heard, the said petition would be presented to the Supreme Court of the United States in its court-room in Washington, D. C.; and that the said Charles S. Burton is the counsel for the appellee in said cases, who is in active charge of said cases on behalf of the appellee.

Albert H. Walker

State of New York, County of New York s.s.

Subscribed and sworn to before me October eleventh 1907.

Notary Public

File Nos. 20,382 & 20,383.

SUPREME COURT U. S.

October Term, 1907

Term Nos. 110 and 111.

White-Smith Music Publishing Co., Appt.,

vs.

Apollo Company.

Petition of Connorized Music Co. for leave to file Brief & to make oral argument and Proof of service of same.

Filed Oct. 17th, 1907

7—58

File Nos. 20,382 & 20,383.

SUPREME COURT U. S.

October Term, 1907.

Term Nos. 110 & 111

White-Smith Music Publishing Co., Appt,

vs.

Apollo Company.

Petition of Victor Herbert to be made a party appellant, for leave to be heard orally, and for leave to file printed brief with notice & proof of service on Counsel for appellant.

Filed Oct. 14th, 1907

7—58

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May 31, 1907.

Nathan Burkan, Esq.,

New York City.

Dear Sir:-

Yours of the 29th inst., received.

Where interested parties desire to file a brief in a case in this court, it is necessary to obtain leave of Court on motion in open court. Notice of such a motion must be given counsel for both sides in the case and printed copies of the proposed brief must be served on said counsel at the time of giving notice of the motion.

The Court has adjourned for the term, and, consequently, no motion for leave to file a brief in the two cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, can be presented until the next term which begins the second Monday of October next.

This case will probably be reached for hearing some time during the month of November, 1907.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.

per H.C.M.

25 Copies of brief will be required here if leave to file is granted.

McK

NATHAN BURKAN,
ATTORNEY AND COUNSELOR AT LAW.
99 NASSAU STREET,
NEW YORK.
TELEPHONE 2619 CORTLANDT

May 29th, 1907.

Dear Sir:

I desire to obtain leave to file briefs on behalf of my clients Victor Herbert and John Philip Sousa in the matter of the appeal now pending in your Court in the action of White-Smith Music Publishing Company against Apollo Company.

Will you kindly oblige me by giving me a reference to or sending me a copy of the procedure which I will have to pursue in order to obtain leave to file and submit briefs on behalf of my clients on the argument of this case.

Yours truly,

Nathan Burkan

Clerk of United States Supreme Court,
Washington, D. C.

NATH
ATTORNEY
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TELEPH

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October 29, 1907.

Nathan Burkan, Esq.,
New York City.

Dear Sir:-

Yours of the 28th inst., received.

The order allowing the Connorized Music Company and Victor Herbert to file briefs in cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, has been entered by me. It is not necessary for you to do anything in relation to entering said order.

Yours truly,

Jas. H. McKenney
Clerk, Supreme Court, U.S.
per
A.M.

NATHAN BURKAN,
ATTORNEY AND COUNSELOR AT LAW,
99 NASSAU STREET,
NEW YORK.

TELEPHONE 2619 CORTLANDT

110
203 8r

Oct. 28th, 1907.

Dear Sir:

My application for leave to file a brief on beha of Victor Herbert in the cases of White-Smith Music Publishing Company against Apollo Company, Numbers 110-111, was granted on the 21st day of October, 1907. Is it necessary for me to have a formal order entered on the decision.

Thanking you in advance, I am,

Yours very truly,

Nathan Burkan

Clerk of the Supreme Court of the United States,
Washington, D. C.

NATHAN
ATTORNEY AND CO
99 NASSA
NEW
TELEPHONE 476C

110
2058

December 31, 1907.

Nathan Burkan, Esq.,
New York City.

Dear Sir:-

Yours of the 30th inst., received.

Cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, will probably be reached for hearing about the 14th or 15th of January, 1908.

Yours truly,

James McKenney
Clerk, Supreme Court, U.S.
per A.M.

14

NATHAN BURKAN,
ATTORNEY AND COUNSELOR AT LAW,
99 NASSAU STREET,
NEW YORK
TELEPHONE 4760-4761 CORTLANDT

Dec. 30, 1907.

Dear Sir:

Can you give me any idea as to the date when the case of White-Smith Company v. Apollo Company will be reached for argument?

Yours very truly,

Nathan Burkan

Clerk of Supreme Court of the United States,
Washington, D. C.

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Nathan Burkan
99 Nassau St
New York City

One Hundred ten wire probably be
Reached to-morrow.

Dr

Form 1.

THE WESTERN UNION TELEGRAPH COM.

INCORPORATED

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after the message is filed with the Company for transmission.
This is an **UNREPEATED MESSAGE**, and is delivered by request of the sender, under the conditions named above.

ROBERT C. CLOWRY, President and General Manager.

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RECEIVED at Corridor, House Representatives JAN 14 1908 190

Dated New York 13

To Clerk of the Supreme Court

Washington DC

Wire Collect whether 110 will be reached Wednesday

OFFICE OF THE CLERK
RECEIVED
JAN 14 1908
U.S.

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Nathan Burkan
99 Nassau Street
New York City

One hundred ten probably reached
about Wednesday of next week.

Jas E. McKenney

Form 168

THE WESTERN UNION TELEGRAPH C

INCORPORATED

24,000 OFFICES IN AMERICA. CABLE SERVICE TO ALL TH

1050
1150
1250

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This is an UNREPEATED MESSAGE, and is delivered by request of the sender, under the conditions named above.

ROBERT C. CLOWRY, President and General Manager.

RECEIVED at Corridor, House Representatives.

34W. Di. Ax. 1205P. 17 Paid. 6 Ex.

New York Jan 11

Clerk U. S. Suprme Court, Washn. D. C.

Wire me Collect when case one hundred ten will be reached.

Nathan Burkan, 99 Nassau St. New York. City.

File Nos. 20,382 & 20,383

SUPREME COURT U. S.

October Term, 1907

Term Nos. 110 & 111.

White-Smith Music Publishing Co., Appt,

vs.

Apollo Company.

Motion of The DeKleist Musical Instrument Manuf'g Co., & The Rudolph Wurlitzer Co., for leave to file brief & proof of service of same.

Granted Nov. 18

Filed Nov. 18th, 1907

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December 23, 1907.

J. Stoyalle Stokes, Esq.,

Philadelphia, Pa.

Dear Sir:-

Yours of the 17th inst., was duly received.

I think the cases involving the question mentioned by you are those entitled The White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, which cases will probably be reached for hearing some time during the week beginning January 13, 1908.

In these cases, counsel for the Connorized Music Co., and Victor Herbert, and counsel for the De Kleist Musical Instrument Co., and The Rudolph-Wurlitzer Co., have obtained leave of Court to file briefs on behalf of their clients. If your Company desires to be heard in the cases, it will have to obtain, through counsel, a member of the bar of this Court, leave of Court to file a brief. The Court has taken a recess until January 6, 1908, which will be the earliest day on which such a motion can be presented.

Yours truly,

James H. McKenney

Clerk, Supreme Court, U.S.

per

(week of Jan 13)

110
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20382

Electrelle Company

Factory
2149 N. Warnock Street

Philadelphia

December seventeenth
1907

Hon. James H. McKenny,

1523 R. J. Avenue, N. W.,

Washington, D. C.

Dear Sir:-

In view of the present attempt on the part of certain monopolistic interests to extend the scope of the Copyright Law, I wish to call to your attention the far reaching effects such a law would have should it be extended to include perforated music rolls as now used by all makers of piano players.

Statistics show that some 48,000 of these players were sold last year, the increase in their use being ver rapid - 60 per cent. gain over the previous year. They are now sold mostly in combination with pianos and nearly all important makers of pianos are now selling such combinations. The time is rapidly approaching when the great majority of pianos will be sold with playing attachments.

There are approximately 380 separate manufacturers of pianos and this industry is among the large manufacturing industries of the country. So that any monopoly that would control a small part of the piano player, which the perforated music sheet is, not only would control the piano player business, but would have an enormous effect on the piano industry. All piano players are dependent in their operation on a perforated music roll. It is a part of the complete machine.

In the pneumatic type of player it is a valve that controls the proper inlet of air to operate the mechanism in the

(week of Jan 13)

proper manner and produces the music.

In the electric piano player, such as I am interested in, the paper sheet acts as an insulator, permitting electric contacts to occur only at certain points. These contacts cause the mechanism to operate. The selective insulator, as it may be termed, is a part of our machine for making music. We could do nothing without such insulating means.

The operation of piano players is not dependent on anything that is printed on these perforated rolls, nothing that can be read; but simply on changes in its physical form - its perforations. Its realm is that of the Patent Law and not of the Copyright Law.

The composer copyrights his score of music, from which he gets a very large remuneration if his work has merit. He is not the inventor of means of making air valves; he is not the inventor or creator of the piano player that uses these air valves; he does not manufacture or create the pianos that make the music. Who is the composer that he should be given, in addition to his copyright of the music score, control of the inventor and manufacturer of instruments that only help to increase the popular taste for music and add to the sales and value of the copyrighted score?

For instance, some thirty or forty United States patents have been granted the Electrelle Company of Philadelphia to protect their invention of a new piano player, for the invention and perfection of which the Company has spent over a quarter of a million of dollars.

The perforated music sheet is an invention hundreds of years old and its use has been for years a matter of public property. Now, what possible justice can there be in the attempt to sweep all inventors aside, all their factories with their large investments in plants of machinery, and further, to deprive the great piano making industry of the means of playing the pianos mechanically?

The Aeolian Company of New York, with its thirty-year contracts with all the principal music publishers under the guise of giving justice to the composer, have been seeking to crush out all competition through this perversion of justice. This would result in the extermination of our own business or its removal to England or other foreign countries which have refused to permit the Copyright Law any such rights. No one could sell in competition any piano player that had the use of its air valves or insulating means restricted.

I will not trespass further on your time, but I simply wish you to know that this is a matter of life or death with a great many large industries, and, in consequence, a matter of importance of which you should know some facts.

I am sending you under separate cover a copy of our catalog describing our Player.

Very truly yours,

Ignace Strauss

President
ELECTRELLE COMPANY.

JSS/ER

Counsel for Connorized Music Co vs Victor Herbert
" " DeKleist Musical Instrument Co vs The Rudolph-
Wurlitzer -

110
20382

Electrelle Company

Factory
2149 N. Warnock Street

Philadelphia

December twenty-sixth
1907

Mr. James H. McKenney,
Supreme Court of the U. S.,
Washington, D. C.

Dear Sir:-

I beg to acknowledge receipt of your letter of December 23d and thank you for the information contained therein. I think that the matter as far as our interests are concerned is in good hands and we would have nothing to gain from accepting your kind offer.

Very truly yours,

J S Stokes
President
ELECTRELLE COMPANY.

JSS/ER

Noans
Dec. 27, 07

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April 13, 1908.

Nathan Burkan, Esq.,

New York City.

Dear Sir:-

I today received, in one of your envelopes, my bill against your client, Victor Herbert, for costs incurred in cases of White-Smith Music Publishing Co. v. Apollo Co., Nos. 110-11, Oct. Term, 1907, and check to my order for $7.75, and I have credited the amount of the check in payment of said bill which I have receipted and return herewith.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.

per

M.M.

110
20382

NATHAN BURKAN.
ATTORNEY AND COUNSELOR AT LAW.
99 NASSAU STREET.
NEW YORK.

James H. McKenny, Es

Clerk of the

BURTON & BURTON.
SUITE 14
Cable Address, Burbur, Chicago.
C. S. BURTON
E. F. BURTON

110
2038

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2038

September 20, 1907.

Chas. S. Burton, Esq.,

Chicago, Ill.

Dear Sir:-

Replying to your letter of the 18th inst., in reference to motions to dismiss the cases of The White-Smith Music Publishing Co., v. The Apollo Co., Nos. 110-11, Oct. Term, 1907, I beg to say that it is the practice to serve printed copies of such motion and brief in support of same on counsel for the other side. Although the rule does not specify that the brief served should be in print, it would seem desirable to serve such motion and briefs in print in order to give the other side an apportunity to refer to the paging thereof.

We have no motion docket in this court. Such motions are noticed for any Monday that the Court is in session, and where briefs are in on both sides, the Clerk calls up the motion and submits it to the Court. In case the opposing brief is not on file on the day noticed for the submission, counsel in support of the motion will have to be present and call up and submit same. Motions noticed for the first day of the term, Monday, October 14, will go over to Tuesday as the Court adjourns immediately after assembling on the first day of the term to pay its respects to the President of the United States.

Yours truly,

James H. McKenney

Clerk, Supreme Court, U.S.
per

BURTON & BURTON,
ATTORNEYS,
SUITE 1410 MARQUETTE BUILDING,
CHICAGO.

Cable Address, Burbur, Chicago.

PATENT LAW A SPECIALTY.
Tel. Central 1651.

110
20382

111
20383

Chicago, Sept.

Hon. Clerk of Supreme Court of United States,
Washington, D. C.

Honorable Sir:-

I beg to impose upon your courtesy for a little information as to usage or practice of the Supreme Court touching motions to dismiss appeals for want of jurisdiction. I understand from Rule 6 that briefs in support of such motion must be filed by the counsel three weeks before the Motion Day, and that all briefs submitted to the Court must be printed in accordance with the requirements of Rule 31. I do not understand, however, that the copies served upon opposite counsel three weeks in advance of the Motion Day are required to be the printed copies. Kindly advise me if I am correct in this understanding.

So far as I discover, the Rules are silent as to the length of time (if any) which the motion must be entered before the Motion Day for which it is noticed. I would infer that the motion entered in open court on Motion Day, with proof of due service of briefs upon opposite counsel in accordance with the Rule will be taken by the Court upon briefs. Am I correct in this understanding, or is there a docket of such motions prepared in advance and upon which such motion must be entered some specific time in advance of the Motion Day?

Is it necessary either for entering the motion,-if it may be entered upon Motion Day upon proof of service of brief,-or for calling up motion on that day if it is previously entered,

that there should be personal appearance of counsel in court, or (since in any event no oral argument will be heard but the motion will be considered primarily upon the briefs alone) may absent counsel file motion and proof of service of briefs and printed copies of briefs, and thereby have motion duly docketed so as to be taken under advisement by the Court as if called up or submitted by counsel present in court? Is the clerk accustomed to pro forma call up motions thus docketed and of which the proper proof of service of briefs and filing of printed briefs appears?

These inquiries are made with special reference to motion which it is the purpose of appellee's counsel to make in cases Nos. 110 and 111 of October term, White-Smith Music Publishing Company vs. Apollo Company, and the present intention is to notice such motion for the first Motion Day of the October Term, October 14th. An early reply will therefore greatly oblige,

Very respectfully yours,

MGA.

Chas. A. Burton
Of Appellee's Counsel

BURTON & BURTON,
ATTORNEYS,
SUITE 1410 MARQUETTE BUILDING

Cable Address, Burbur, Chicago.

C. S. BURTON
E. F. BURTON

110
203

October 10, 1907.

Chas. S. Burton, Esq.,

Chicago, Ill.

Dear Sir:-

Yours of the 8th inst., received.

Only a sufficient number of copies of records are printed to allow three copies to a side, and the three copies allowed to your side in the two cases of White-Smith Music Publishing Co, v. Apollo Co., Nos. 110-11, Oct. Term, 1907, have been furnished, one to you, one to Mr. Chas. A. Brodek and one to Mr. John W. Munday. I am informed by the printers that they have one or two copies of this record and I can obtain one for you, if desired. Their charge for the copies is $5.00 each.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.
per

J.S.A.

BURTON & BURTON,
ATTORNEYS,
SUITE 1410 MARQUETTE BUILDING,
CHICAGO.

PATENT LAW A SPECIALTY.
Tel. Central 1651.

Cable Address, Burbur, Chicago.

110
2382
111
2383

Chicago, Oct. 10, 1907

Clerk Supreme Court of the United States,

Washington, D. C.

Honorable Sir:-

Will you kindly, if consistent, furnish Mr. John J. O'Connell, 31 Nassau St., New York City, a copy of the record in the consolidated suits, White-Smith Music Publishing Company vs. Apollo Company, Nos. 110 and 111, October term calendar. Mr. O'Connell will probably be associated as counsel for the defendants if the case comes to hearing on the merits (that is, if the pending Motion to Dismiss for want of jurisdiction is not sustained). His appearance may be entered before the determination of that Motion, or it may be postponed and entered only in case the Motion is overruled, but in either case it is desirable that he should have copy of the record at present time, and I hope it may be found consistent to comply with this request.

Respectfully,

Chas. A. Burton

J.S.A.

BURTON & BURTON,
ATTORNEYS,
SUITE 1410 MARQUETTE BUILDING,
CHICAGO.

PATENT LAW A SPECIALTY.
Tel. Central 1651.

Cable Address, Burbur, Chicago.

C. S. BURTON
E. F. BURTON

110 vc
2038

Chicago, Sept. 23, 1907.

Clerk of the United States Supreme Court,

Washington, D. C.

Hon. Sir:-

We beg to thank you for yours of Sept. 20th, replying to mine of the 18th inst. in the matter of practice respecting motion to dismiss appeals, service of brief, etc. I shall probably cover the point which you suggest as to convenience of having opposite counsel furnish briefs in print by giving them briefs in that form in ample time for reference to the paging thereof in reply brief (in addition to the manuscript brief served earlier).

Again thanking you, I am,

Very respectfully,

MGA.

Chas. S. Burton

No answer -

BURTON & BURTON,
ATTORNEYS,
SUITE 1410 MARQUETTE BUILDING,
CHICAGO.

Cable Address, Burbur, Chicago.

C. S. BURTON
E. F. BURTON

PATENT LAW
Tel. Cer

110 & 111
2038

October 25, 1907.

Chas. S. Burton, Esq.,
Chicago, Ill.

Dear Sir:-

Yours of the 22d inst., enclosing three affidavits in cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, two of Fred Kann and one of Adolph L. Jansen, duly received.

I have retained one of the Kann affidavits and have filed same, and I return the other affidavit and the affidavit of Jansen herewith. I now have on file two affidavits each of Davis, Wallace, Kann and Jansen. I have heretofore received the original motion in case No. 110, and now think that the motion files in the cases are complete.

Yours truly,

Jas. H. McKenney
Clerk, Supreme Court, U.S.
per
L.M.

BURTON & BURTON,
ATTORNEYS,
SUITE 1410 MARQUETTE BUILDING,
CHICAGO.

PATENT LAW A SPECIALTY.
Tel. Central 1651.

Cable Address, Burbur, Chicago.

110 & 111
2058

Chicago, Octob

Copied 28

Mr. Jas. H. McKenney,

Clerk, Supreme Court of the United States,

Washington, D. C.

Honorable Sir:-

Yours of October 18th in the matter of the White-Smith Music Publishing Co. vs. Apollo, Nos. 110 and 111, October Term, 1907, received at my office during my absence and asking for original Motion to Dismiss, in Case No. 110, I find has received attention to the extent of forwarding the original Motion to you for filing.

Referring to the matter of the Affidavits and the difficulty which I understand was found in distributing them to the proper files in the two cases, I call attention to the following:-

1. Of Bartlett, Page and Clark there are two Affidavits, one for each case (differing as the detail facts of the two cases differ).

2. Of Davis, Wallace, Kann and Janson there is but one Affidavit each, the facts of both cases being stated in such Affidavit.

3. Kann makes two Affidavits at different dates, each, however, relating to both cases, the second Affidavit being accompanied by separate Notice and Acceptance of Service of copy.

One of the Kann affidavits filed

4. There should be in the files duplicates of the Affidavits of Davis, Wallace, Kann and Janson, so that one may be placed in each file. I find still remaining in my files duplicates of both the Kann Affidavits, and of the Janson Affidavit; and I am not certain whether this is due to the fact of the Affidavits having been in fact signed in triplicate, or to the omission to hand you, for filing, the duplicates, as intended. I am enclosing these duplicates (or triplicates, as they may prove to be), and request you to note them as filed and use them for completing the files which may be lacking, if you find that you have not already duplicates for that purpose.

If there are lacking from the files duplicates of any of the others of the second group, - namely, Wallace or Davis, - will you kindly advise me and I will look them up and forward them. If you do not have them it is because they have been, through inadvertence, retained by some other counsel in the case instead of mere copies.

Regretting the inconvenience which the failure to forward the necessary number of copies or duplicates may have caused you, I remain

Very truly yours,

Chas. B. Burton

J.S.A.
Enc.

BURTON & BURTON,
ATTORNEYS,
SUITE 1410 MARQUETTE BUILDING,
CHICAGO.

PATENT LAW A SPECIALTY.
Tel. Central 1651.

Cable Address, Burbur, Chicago.

C. S. BURTON
E. F. BURTON

11/283

110/202

Chicago, Dec. 11, 1907.

December 13, 1907.

Chas. S. Burton, Esq.,
Chicago, Ill.

Dear Sir:-

Yours of the 11th inst., received.

Cases of White-Smith Music Publishing Co. v. Apollo Co., Nos. 110-11, Oct. Term, 1907, will not be reached before the Christmas Holidays. I now think that said cases will be reached for hearing some time during the week beginning January 13, 1908.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.
per

H.M.

BURTON & BURTON,
ATTORNEYS,
SUITE 1410 MARQUETTE BUILDING,
CHICAGO.

PATENT LAW A SPECIALTY.
Tel. Central 1651.

Cable Address, Burbur, Chicago.

111
20283

110
20283

Chicago, Dec. 13, 1907.

Clerk of the U. S. Supreme Court,

Washington, D. C.

Sir:-

So far as can be judged by the rate of advancement up to last night, the cases of White-Smith Music Publishing Co. vs Apollo Company, Nos. 110 and 111 on the Supreme Court calendar, cannot be reached before the holiday adjournment, the 20th of December, but I will be greatly obliged if you will give me your best forecast upon the point by return mail.

Thanking you in advance for the same, I am,

Very truly yours,

MGA.

Chas. D. Burton

110
20 58

JOHN J. O'CONNELL,
COUNSELLOR AT LAW,
31 NASSAU STREET.

TELEPHONES 2273 2274

December 17, 1907.

John J. O'Connell, Esq.,
New York City.

Dear Sir:-

Yours of the 16th inst., received.

While it is possible that cases Nos. 110-11, Oct. Term, 1907, may get on the call for Friday of this week, I do not think there is any probability of their being reached for argument until after the recess, and as there are a number of cases specially assigned for January 6, 1908, the above cases will probably not be reached before the latter part of the week beginning that day or the early part of the following week. I will endeavor to wire you in time for you to get here for the argument.

Yours truly,

Jas. H. McKenney
Clerk, Supreme Court, U.S.
per
M.M.

110
2038

JOHN J. O'CONNELL
COUNSELLOR AT LAW,
31 NASSAU STREET,

TELEPHONES 2273 / 2274 CORTLANDT.

NEW YORK,

James H. McKinney, Esq.,
Clerk of United States Supreme Court,
Washington, D. C.

Dear Sir:-

I am of counsel in the White-Smith cases, Nos. 110 and 111. I have been informed by Mr. Burton that the cases can be reached for argument before recess.

I assume you make up your calendar each evening for the next day, and I would be obliged if you would telegraph me at my expense when the case is to be reached.

My office address is as above, and my house address is No. 309 West 93rd Street, New York City. So that there may be no mistake, kindly have the telegram sent to both addresses.

Very truly yours,

J. J. O'Connell

BURT

SUITE 1410

PAT
T

110
203

January 23, 1908.

Chas. S. Burton, Esq.,

Chicago, Ill.

Dear Sir:-

In reply to your letter of the 20th inst., in reference to additional matter which you desire to bring before the Court in cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, I beg to say that as no leave was obtained to file any additional papers, nothing further can be filed without permission of the Court. See section 4, Rule 20.

Yours truly,

James H. McKenney

Clerk, Supreme Court, U.S.

per W.R.S.

and in response to a remark of Justice Holmes I stated that an official publication of those laws would be cited to the Court. In the multiplicity of details calling for attention at the conclusion of the argument, I am not certain that the copy referred to was left with the other material submitted to the Court.

Both the publications referred to,- Proceedings of the Committees on Patents and Foreign Copyright Laws,- being Government publications are accessible if identified, and I take the liberty of asking that, at your discretion, you cause to be placed with the material of these cases, or otherwise brought to the attention of the Court if you see fit, a suitable number of copies of both the matters referred to; viz.:-

BURTON & BURTON,
ATTORNEYS,
SUITE 1410 MARQUETTE BUILDING,
CHICAGO.

PATENT LAW A SPECIALTY.
Tel. Central 1651.

Cable Address, Burbur, Chicago.

Chicago, Jan. 20.

110
20382

Clerk of the Supreme Court of the United States,

Washington, D. C.

Dear Sir:-

In Nos. 110 and 111, White-Smith Music Publishing Co. vs. Apollo, lately argued, counsel cited to the Court the proceedings of the House and Senate Committees on Patents of the last Congress, a single copy being present for reference. I am under the impression, however, that even that single copy was not left with the other matters referred to in the argument and may not be found with that matter when the Court comes to take the case up for consideration.

Citation was also made to the Foreign Copyright Laws, and in response to a remark of Justice Holmes I stated that an official publication of those laws would be cited to the Court. In the multiplicity of details calling for attention at the conclusion of the argument, I am not certain that the copy referred to was left with the other material submitted to the Court.

Both the publications referred to,- Proceedings of the Committees on Patents and Foreign Copyright Laws,- being Government publications are accessible if identified, and I take the liberty of asking that, at your discretion, you cause to be placed with the material of these cases, or otherwise brought to the attention of the Court if you see fit, a suitable number of copies of both the matters referred to; viz.:-

quiry of the Register of Copyrights, to whom I am sending a copy of this letter so that a brief inquiry on your part will fully advise him of the material wanted.

Thanking you for the exercise of your discretion in the premises and for such steps as you may judge fit to take in the direction indicated, I am,

Respectfully yours,

Chas. D. Burton

MGA.

Section 4, Rule 20

BURTON & BURTON,
ATTORNEYS,
SUITE 1410 MARQUETTE BUILDING,
CHICAGO.

PATENT LAW A SPECIALTY.
Tel. Central 1651.

Cable Address, Burbur, Chicago.

C. S. BURTON
E. F. BURTON

Chicago, Jan. 20, 1908.

110
202

January 24, 1908.

Chas. S. Burton, Esq.,

Chicago, Ill.

Dear Sir:-

Yours of the 20th inst., in reference to the cases of White-Smith Music Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, duly received, and I have today received the twenty-five additional copies of the brief for appellee, for which I beg to thank you very much. I will see that they are placed where they will do the most good.

Yours truly,

James H. McKenney

Clerk, Supreme Court, U.S.

per

Rec'd

BURTON & BURTON,
ATTORNEYS,
SUITE 1410 MARQUETTE BUILDING,
CHICAGO.

PATENT LAW A SPECIALTY.
Tel. Central 1651.

Cable Address, Burbur, Chicago.

Chicago, Jan. 24, 1908.

110
2028

Clerk of the Supreme Court of the United States,

Washington, D. C.

Dear Sir:-

I am sending you today by Adams Express twenty-five additional copies of brief of appellee in suit of White-Smith vs. Apollo, Nos. 110 and 111, October 1907 Calendar, which I trust will be sufficient to supply at least the calls of members of House and Senate Committees on Patents, who, I beg to suggest, should be given preference over other parties requesting these copies at least until a larger supply shall have been printed, if that shall be determined upon, as is not improbable in view of the wide call for them.

Respectfully yours,

Chas. D. Burton

MGA.

Rec'd

BURTON & BURTON,
ATTORNEYS,
SUITE 1410 MARQUETTE BUILDING,
CHICAGO.

PATENT LAW A SPECIALTY.
Tel. Central 1651.

Cable Address, Burbur, Chicago.

C. S. BURTON
E. F. BURTON

Chicago, Jan. 25, 1908.

110
2038

Mr. James H. McKenney,

Clerk of Supreme Court of United States,

Washington, D. C.

Dear Sir:-

I beg to thank you for yours of January 23d in reply to mine of the 20th inst., referring to certain publications which were produced and referred to in argument, and through oversight not left with the papers, as I supposed was necessary and would have been required if the oversight had been noticed.

I had not supposed that Section 4 of Rule 20 which relates to briefs was applicable to matter of this kind, which is partly the nature of citation of authorities requested by the Court and partly material of which the Court was asked to take judicial notice by both parties,- by the appellant in the petition for certiorari and by the appellee in the brief on the merits.

Doubtless, however, you are right in your interpretation of the application of Rule.

Again thanking you, I am,

Yours very truly,

MGA.

Chas. S. Burton

No Exs

Jan. 27. 08

BURTON & BURTON,
ATTORNEYS,
SUITE 1410 MARQUETTE BUILDING,
CHICAGO.
PATENT LAW A SPECIALTY.
Tel. Central 1651.

Cable Address, Burbur, Chicago.

C. S. BURTON
E. F. BURTON

110 & 111
Dec 1908

Chicago, Jan. 24, 1908.

Clerk of the U. S. Supreme Court,

Washington, D. C.

Dear Sir:-

Referring to mine of the 20th inst. mentioning certain Copyright Office publications which might be placed with the material produced at the hearing in White-Smith Music Publishing Company vs. Apollo Company, Nos. 110 and 111, I am in receipt of letter from Register of Copyrights correcting my reference to one of these publications. I referred to Bulletin No. 7, "Foreign Copyright Laws", but as the Register points out, my reference should have been to Bulletin No. 5, "Copyright in England". The latter was the publication referred to in the argument and which contains the matter read in part to the Court.

Very truly yours,

MGA.

Chas. F. Burton

Rec'd ans. of 23d inst
to Burton's letter of
20th inst-
Jan. 27. 08

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1907.

In the matter of the petition of White-Smith Music Publishing Co. for a Writ of Certiorari directed to the United States Circuit Court of Appealsfor the Second Circuit and to the United States Circuit Court for the Southern District of New York to bring before the said Supreme Court the case of White-Smith Music Publishing Co. vs. Apollo Company.

To APOLLO COMPANY, defendant and CHARLES S. BURTON, ESQ.of Counsel for defendant.

Please take notice that upon the copy of the Transcript of Record herein which is already in this Court on appeal and upon the annexed petition of the complainant, I shall move before the Supreme Court of the United States at the Capitol in the City of Washington,D.C. at the hearing of the defendant's motion to dismiss the appeal herein, for the grant of the prayer of the annexed petition for certiorari and for such other and further relief as to the Court may seem just.

Yours etc.,

Dated New York, Nov. 6th 1907.

Livingston Gifford

Of Counsel for Petitioner.

Service of a copy of the above notice and the annexed petition is admitted this 6th day of November 1907.

Wilcox & Bridel

Of Counsel for defendant

January 11, 1908.

Livingston Gifford, Esq.,

New York City.

Dear Sir:-

Yours of the 10th inst., also, nine copies each of the two musical compositions heretofore filed as exhibits in cases of White-Smith Co., V. Apollo Co., Nos. 110-11, Oct. Term, 1907, duly received.

I have wired you today that these cases will probably be reached on Wednesday of next week.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.

per

File No. s. 20382 & 20383.

OFFICE OF THE CLERK
OF THE
SUPREME COURT OF THE UNITED STATES.

WASHINGTON, D. C., Dec. 17, 1906.

Harold Bunney, Esq.,
141 Broadway
New York city.

SIR:

It becomes necessary, under the provisions of rule 10, that your clients immediately provide the money to pay the Clerk's costs and cost of printing the record, in the case of

White Smith Music Publishing Co. Appt.
vs.
Apollo Company

No. s. 417 & 418 October Term, 1906. This is the only notice that will be given you, and if the parties fail to deposit the amount called for, the case when reached in the regular call of the docket will be dismissed pursuant to Sec. 2 of said rule.

In this case the amount estimated is as follows, viz:

Clerk's Costs, ...	$ 515.00
Printing Record, . . .	945.00
Total, ...	1460.00
Deduct amount on deposit, .	50.00
Total amount to be furnished	$ 1410.00

The cost of printing the record and Clerk's costs in case of a reversal of the judgment or decree will be taxed on the mandate and be recoverable from the unsuccessful party, except in cases where the United States is a party. (See Secs. 3 and 4, Rule 24.)

The costs accruing to the Clerk belong to the United States, and it is his duty to collect them.

See Rule 10, Secs. 2 and 6, Rule 24, Secs. 3 and 4, and an extract from the decision of the Court in Stevens vs. Kinkman, 109 U. S., 74, printed on the back of this notice.

Very respectfully,

JAMES H. McKENNEY,
Clerk Supreme Court U. S.

(Seal by request)

Living
J. Edg

110
111
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July 25, 1907.

Livingston Gifford, Esq.,

New York City.

Dear Sir:-

Yours of the 24th inst., and check of your firm to my order for $1,435.00, duly received, and I have credited the amount of the check as an additional deposit to cover estimated costs in cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110 and 111, Oct. Term, 1907.

I will at once proceed with the printing of the record and when the work is completed will send copies to counsel.

Please sign and return the enclosed appearance forms and I will then enter your appearance for the appellant in each case.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.

per H.C.M.

fan

July 25.07

July 20, 1907.

Livingston Gifford, Esq.,
New York City.

Dear Sir:-

Yours of the 19th inst., received.

The two cases of White-Smith Music Co. v. Apollo Co., Nos. 110 and 111, Oct. Term, 1907, will probably be reached for hearing some time during the month of November, 1907.

An estimate showing balance necessary to be deposited before the record in above cases can be printed was mailed to Mr. Harold Binney, 141 Broadway, your city, June 10, 1907, which estimate is as follows:

Clerk's costs	$515.00
Cost of printing record	$945.00
Total	$1460.00
Amount now on deposit	25.00
Balance to be deposited before the record can be printed	$1435.00

Yours truly,

Jas. H. McKenney
Clerk, Supreme Court, U.S.
per

Livingston Gifford.
J. Edgar Bull.

110
20382

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20385

Gifford & Bull,

Counsellors at Law.

New York, July 19, 1907

Clerk U. S. Supreme Court
Washington, D.C.

Dear Sir:-

Will you be so kind as to inform me as to the present status of the record in the case of White-Smith Music Publishing Co. v. Apollo Co. There seems to be some uncertainty as to whether your estimate for printing the record has been received and, if so, whether it has been attended to. If it has been sent and has not been attended to, will you be so kind as to send me a copy of it so that I can see that it receives attention.

Yours truly,

Livingston Gifford.

Nov 1907

C 515.00
P 945.00
1460.00
24 25.00
1435.00

Harold Bunny - 141 Broadway
June 10, 1907

August 1, 1907.

Livingston Gifford, Esq.,

New York City.

Dear Sir:-

Yours of the 31st ult., received.

At the request of Mr. Burton, who was here some days ago, I held up the printing of the record in cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110 and 111, Oct. Term, 1907, until he could consult with you in relation to said cases. When he was here, I informed him that these cases would probably be reached for hearing in regular call of the docket some time during the month of November next, and that as the cases would be reached for hearing so soon after the beginning of the next term, the Court would, in all probability, if a motion to dismiss was submitted prior to the cases being reached for hearing, postpone the consideration of said motion until the cases are reached for hearing.

If, however, the motion to dismiss is promptly submitted on the meeting of the Court, the Court will, no doubt, act promptly thereon, and if so, I will have time to print the record for the hearing after the motion is disposed of, provided it is denied or its consideration postponed to the hearing.

Please let me know as soon as possible whether or not I shall proceed now with the printing of the record.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.

per

Livingston Gifford.
J. Edgar Bull.

110
2038

Gifford & Bull,

Counsellors at Law.

New York, July 31, 1907

White-Smith Co. v. Apollo

James H. McKenney Esq.
U.S. Supreme Court
Washington, D.C.

Dear Sir:-

Mr Burton has called and desires to have the printing of the record in the above case held up till he can make a motion to dismiss at the opening of the term. I believe he also spoke to you about it a few days ago.

I am disposed to consent to his request if it can be done without jeopardizing the hearing of the case when reached provided his motion to dismiss should be denied. I am uncertain whether, in case his motion to dismiss should be denied, there would still be time left for the printing of the record and the preparation and filing of the briefs before the case would be called for argument. It is a long record and, therefore, the time required for printing and for preparation of briefs will be long.

Perhaps you can give me some assurance as to the above which would make me feel safe in consenting to his request.

Yours truly,

Livingston Gifford

August 3, 1907.

Livingston Gifford, Esq.,

New York City.

Dear Sir:-

Yours of the 2d inst., in relation to cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110 and 111, Oct. Term, 1907, duly received.

Case No. 110 on the docket for October Term, 1906, was reached for hearing November 16, 1906, and I have no doubt that the above mentioned cases, Nos. 110 and 111, Oct. Term, 1907, will be reached during the early part of November, 1907, and as these cases will be reached so soon after the beginning of the coming term, it is not likely that the Court would consider a motion to dismiss them until they are reached for hearing in regular call of the docket. If such a motion should be submitted during the first or second week of the coming term, the chances are the Court would enter an order postponing its consideration until the cases are reached for hearing. It seems to me, therefore, that you had better have the record printed now so that you may have ample time to prepare for both the motion and the merits in the cases.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.

per M.M.

Livingston Gifford.
J. Edgar Bull.

Washington
141 Br

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Gifford & Bull,

Counsellors at Law.

New York, August 3, 1907

White-Smith Co. v. Apollo, Nos. 110, 111

Jas. H. McKenney Esq.
U.S. Supreme Court
Washington, D.C.

Dear Sir:-

I have yours of the 1st instant. I do not wish to run any chances, not even the slightest, of these cases losing their place on the calendar or not being heard when reached, and it seems to me from your letter of the 1st that by delaying the printing in the manner suggested, we run some chance.

For example, the Court convenes October 14th and if these cases should be reached early in November, it would be a pretty close call for you to get such a long record printed to say nothing of the necessity of our getting our printed brief filed six days before the hearing. If, now, by any mishap the printing of the record or of the briefs should not be completed when the cases were called, I am afraid that the Court might put them down to the foot of the calendar or otherwise postpone them for a long period.

Then, again, your letter states that you would have time to print the record after the motion was disposed of if the Court should act promptly thereon and I do not know exactly what would happen if the Court should not act promply enough to enable you to print the record before the cases were called.

Under the circumstances, do you not think our only safe course is to let you go ahead and print the record now and that any other course might result in the hearing of the cases being put over perhaps to the foot of the calendar?

Yours truly,

Livingston Gifford.

Nov 16

Livingston Gifford.
J. Edga

Washington Life Building,
141 Broadway

110
20

Livingston Gifford, Esq.,
New York City.

Dear Sir:-

In Yours of the 13th inst., requesting me to proceed with the printing of the record in cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, also package by express containing the plates Nos. 1, 2 and 3 mentioned in your letter, duly received, and I have this day placed the record in these cases in the hands of the printer, and have also turned over to them the plates for use in printing. When the printing is completed, copies will be sent to counsel.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.
per

L. Com.

Livingston Gifford

Livingston Gifford.
J. Edgar Bull.

110
2387

Gifford & Bull,

Counsellors at Law.

New York, August 12, 190

White-Smith Co. v. Apollo, Nos. 110, 11

James H. McKenney Esq.
Washington, D.C.

Dear Sir:-

In view of my correspondence with you and after corresponding with Mr Burton, I conclude that the only safe course is for the printing to go ahead. Will you therefore proceed with it.

For the purpose of printing the record in the lower Court, there were certain plates made which were quite expensive and which will be of assistance to you in reprinting. I am therefore sending you by express the following:

1. The plate of page 431 of complainant's Exhibit Book in lower Court
2. The plate of page 433 " " " " " "
3. " " " " 435 " " " " " "

Yours truly,

Livingston Gifford

September 21, 1907.

Gifford & Bull, Esqs.,

New York City.

Gentlemen:-

Yours of the 20th inst., requesting six additional copies of the record in the cases of White-Smith Music Publishing Co., v. The Apollo Co., Nos. 110-11, Oct. Term, 1907, duly received.

One copy of this record has already been sent to you and to Mr. Harold Binney. I, therefore, send you one additional copy which exhausts the number allotted to your side, and have obtained five additional extra copies from the printers which go to you by express today. Please sign and return the enclosed receipt for same. The cost of the extra copies will be deducted from the deposit made in the cases.

Yours truly,

James H. McKenney

Clerk, Supreme Court, U.S.

per W.R.C.

Livingston
J. Edgar P.

110
110-20

October 10, 1907.

Livingston Gifford, Esq.,

New York City.

Dear Sir:-

Yours of the 9th inst., received.

I now think that the two cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, will not be reached until after the Thanksgiving recess. They will probably be reached for hearing during the first week of December next.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.

per H.M.

I am assuming at present that there is no danger of being reached before November 1st

Call Nov 1

Early Dec

Livingston Gifford.
J. Edgar Bull.

111
110
2038
2038

Gifford & Bull,

Counsellors at Law.

October 10, 1907

New York, October 9, 1907

White-Smith v. Apollo

James H. McKenney Esq.
Washington, D.C.

Dear Sir:-

In your letter to me of August 3rd you said: "I "have no doubt that the above mentioned cases Nos. 110 and 111 "October Term 1907 will be reached during the early part of "November 1907."

I write to ask what the present prospect is as to the time when these cases will be reached for argument on the merits. Any information you can give me as to the present prospect, I will appreciate.

Yours truly,

Livingston Gifford.

I am assuming at present that there is no danger of being reached before November 1st

Let Nov 5
Early Dec

Livingston Gifford
J. Edgar

Washington Life Building,

110
N C

October 29, 1907.

Livingston Gifford, Esq.,

New York City.

Dear Sir:-

Yours of the 28th inst., and two copyrighted musical compositions, "Little Cotton Dolly", and "Kentucky Babe", with stipulation attached thereto, agreeing that they may be added to the record in cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, duly received, and I have filed same as a stipulation and addition to the record. If I find that the deposits already made are not sufficient to cover the cost of reproducing same, I will call on you for an additional deposit.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.

per H.C.M.

Enclosure

Livingston Gifford.
J. Edgar Bull.

110
111
238

Gifford & Bull,

Counsellors at Law.

October 28, 1907

New York, October 28, 190

White-Smith Co. v. Apollo Co.
Nos. 110, 111.

James H. McKenney Esq.
Washington, D.C.

Dear Sir:-

I found that the record has omitted the copies of the two copyrighted musical compositions "Little Cotton Dolly" and "Kentucky Babe" and Mr Burton and I have entered into the enclosed stipulation that they be added to the record and you will find the copies attached to the stipulation. You will find in these copies certain pages crossed out in blue pencil. These should be omitted in the reproduction since they do not relate to the musical compositions in question. All those pages not crossed out in blue pencil should be reproduced.

Please send your bill for this addition to the record to me.

Yours truly,

Livingston Gifford

Enclosure

October 8, 1907.

Albert H. Walker, Esq.,

New York City.

Dear Sir:-

Yours of the 7th inst., in relation to the two cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, duly received.

You can notice your motion for leave to file a brief and orally argue these cases for the 14th inst., and call it up and submit it on the 15th inst. Court will not do any business on the 14th inst., except to admit attorneys and announce to the bar that they will begin the call of the docket on the following day, but motions noticed for the 14th inst., can be called up and submitted on the 15th inst. You should give notice to counsel for both sides in said cases of your motion, and serve copies on them at once, and, if they desire additional time to reply to your motion, the Court will, no doubt, allow them a few days to file a brief in opposition to it, on request being made to that effect at the time your motion and the motion to dismiss said cases are submitted. The Court will not permit you to orally argue the motion. An original and twenty-five printed copies of the motion should be filed with me. One of the printed copies can be made an original by your signing same, and proof of service of the motion on counsel for both sides should be filed.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.

per K.M.

Albert A. Walker
Counselor at Law

111
2353

110
2038

Floor 10 Park Row Building, Manhattan, New

October 7, 1907.

Mr. James H. McKenney,

Clerk U. S. Supreme Court,

Washington, D. C.

Dear Sir:-

When the two cases of the White-Smith Music Publishing Company vs. The Apollo Company, were pending in the United States Circuit Court for the Southern District of New York; my client, the Automusic Perforating Company, filed a petitition in that court to be admitted as co-defendant in each of those cases. That petition was based upon detailed statements in an accompanying affidavit, ~~covered~~ with an offer to prove by regularly taken depositions, that the Automusic Perforating Company had a very large pecuniary interest in the result of the suits, and that it would suffer very large pecuniary losses if the suits were to be decided against the defendant, the Apollo Company.

The Circuit Court took that petition under advisement during several months, and then entered an order denying it, at the same time that it entered a decree for the defendant; apparently taking the view that the Automusic Perforating Company did not need to be made co-defendant for the purpose of averting a decree for the complainant, which was not going to be made anyhow. Thereupon the complainant appealed the cases to the Circuit Court of Appeals for the Second Circuit, and when the cases came on for argument in that tribunal, I presented a motion to the court to be permitted to file a brief on behalf of the Automusic Perforating Company, and

also to be permitted to make an oral argument for that corporation, because that corporation had a large pecuniary interest in the cases, and would incur large pecuniary losses if those cases were finally to be decided for the complainant. Afterward, the Circuit Court of Appeals for the Second Circuit affirmed the decree of the Circuit Court and thus again averted loss and injury ~~for~~ from my client, the Automusic Perforating Company.

Afterward, in August 1906, the name of the Automusic Perforating Company was duly changed according to law to the Connorized Music Company, and without any other change in the corporate organization; so that the Connorized Music Company is now the same corporation as was the Automusic Perforating Company, and is managed by the same men and owned by the same stockholders, and engaged in the same business and has the same interest in the question involved in the two Apollo cases.

Sometime in the latter part of 1906, the White-Smith Music Publishing Company appealed those two cases to the Supreme Court of the United States, and those cases are so situated on your docket as to be reachable for argument during the last half of November, 1907.

Now the Connorized Music Company has employed and directed me to present to the Supreme Court of the United States a motion to be permitted to file a brief, and also to be permitted to make an oral argument, on the side of the defendant, in each of the two Apollo cases now pending in the Supreme Court, as I was permitted to do when those cases were pending in the Circuit Court of Appeals.

The reason which causes the Connorized Music Company to desire to present printed and oral argument to the Supreme Court in these

two cases is based upon the fact that the counsel for the defendant of record, the Apollo Company, is not willing to present to the court either orally or in print, that view of the issues in the caseswhich I have advised is indispensible to their proper consideration and disposition.

It is my opinion that a decree in favor of the appellant, the White-Smith Music Publishing Company, would be inconsistent with the Consitution of the United States relevant to copyrights, and would also be inconsistent with the statutes of the United States relevant to copyrights. The attorneys for the Apollo Company agree with me in this last opinion, but disagree with me on the constitutional point and informed me that they did not intend to present any such point to the Supreme Court. The Circuit Court based its decision in favor of the defendant primarily on the constitutional point and secondarily on the statutory point, holding either point tombe sufficient to support the decision.

The Circuit Court of Appeals based its decision on the statutory point alone, when affirming the decree of the Circuit Court, the presiding justice of the Circuit Court of Appeals explaining to me during my oral argument that that court had no jurisdiction to decide whether the Circuit Court had been right or had been wrong on the constitutional question.

Now it is my view that the constitutional question is involved in the case in the Supreme Court, for it is plainly raised by the record and was decided by the Circuit Court, though it was not decided by the Circuit Court of Appeals for the want of jurisdiction to decide any constitutional question. And it is my view that it is proper for the Connorized Music Company to intervene in the

Supreme Court with a motion to be permitted to argue the constitutional question; because that Company is the same corporation, which under the name of the Automusic Perforating Company, contributed money toward the cause of the defendant both in the Circuit Court and the Circuit Court of Appeals, and would on account of that contribution be bound by a decision of the Supreme Court reversing the decree of the Circuit Court of Appeals.

It is under these circumstances that I venture to ask you what is the proper practice for me to follow in presenting to the Supreme Court a motion to be permitted to file a brief on the side of the appellee, and to be permitted to make an oral argument on the same side, when the case comes on for argument in November; When the same question of practice arose in the Circuit Court of Appeals, it was held proper by that tribunal for me to make that motion when the case was reached on the regular call of the docket and without giving any previous notice to the appellant or to the appellee of record.

But now I prefer to present my motion to the Supreme Court in print, and if proper, with an oral argument, and to do this next Monday at the first day of the term, or as soon thereafter as is proper. And I wish also to serve printed copies of my petition upon counsel for the appellant and also upon counsel for the appellee of record as long as possible before I present the motion in court.

The shortness of the time between now and the first day of the term of the court is due to the fact that I was not employed until today to present to the Supreme Court the motion of which I speak.

I do not gather from the rules of the Supreme Court any definite guide to action under these circumstances, and therefore to avoid all possibility of error, I have ventured to lay the whole matter before you and to ask you what appears to be the proper practice in the premises.

Yours very truly,

Albert H. Walker

P. S. The proposed motion of the appellee of record to dismiss the appeals on the ground that neither case involves more than one thousand dollars besides costs, would perhaps be grantable if the cases did not involve the construction or application of the Constitution of the United States. But I suppose that the Supreme Court will deny those motions to dismiss as soon as they learn from my petition to intervene, that the cases do involve the construction and application of the Constitution of the United States; and that the Circuit Court in deciding the cases, did construe and did apply the Constitution of the United States. I particularly desire to present my petition next Monday in order that it may be before the court at the same time with the motion of the Apollo, Company to dismiss the appeals; my client and myself being strongly opposed to that motion, while being strongly opposed to the appellant on the merits of the cases.

A. H. W.

October 13, 1908.

Albert H. Walker, Esq.,
New York City.

Dear Sir:-

Yours of the 12th inst., received.

Two cases entitled White-Smith Music Publishing Co. v. Apollo Company, on appeal from the U. S. Circuit Court of Appeals for the Second Circuit, were docketed September 29, 1908, under Nos. 417 and 418 for the October Term, 1908. They will not be reached for hearing in regular call of the docket for at least a year.

Yours truly,

Jas. H. McKenney

Clerk, Supreme Court, U.S.

per

Albert A. Walker
Counselor at Law

Floor 10 Park Row Building, Manhattan, New

Oct. 12, 1906

Clerk of the United States Supreme Court,

Washington, D. C.

Dear Sir:-

Please to inform me whether you have a case on your docket, (and if so what is its number,) entitled, The White-Smith Music Publishing Company vs. The Apollo Company, supposed to have been appealed to your court from the United States Circuit Court for the Second Circuit.

Yours very truly,

Albert A. Walker

October 14, 1907.

Albert H. Walker, Esq.,

New York City.

Dear Sir:-

Yours of the 11th inst., enclosing original petition of the Connorized Music Co., for permission to file brief and make oral argument in its behalf in cases of The White-Smith Music Pub. Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, with acceptance of service by Livingston Gifford and affidavit of service on Charles S. Burton endorsed thereon, was received by me on the 12th inst. I today received twenty-five copies of said petition, have filed same and copies have been distributed to the Court.

Yours truly,

Jas. L. McKenney

It was impossible for me to get back from Chicago an acceptance of service of the petition and notice upon Mr. Burton. But he has informed me in writing that the appellee will not actively oppose the granting of such a petition; and he has also informed me that he presumes there will be no occasion for anyone on behalf of the appellee to be present when my petition is presented.

Yours very truly,

Albert H. Walker

P.S. The papers also show service of the motion

Albert H. Walker
Counselor at Law

110
111

Floor 10 Park Row Building, Manhattan

October 11, 1907.

Mr. James H. McKenney,
Clerk U. S. Supreme Court,
Washington, D. C.

Dear Sir:-

I am sending you by express twenty-five complete printed copies of the petition of the Connorized Music Company for permission to file a brief and also to make an oral argument on the side of the appellee in the two cases of the White-Smith Music Publishing Company vs. the Apollo Company, Nos. 110 and 111.

I enclose herein the original of that petition, together with an accepted notice of the service thereof upon Livingston Gifford, the counsel for the appellant, and together with my affidavit, which I think you will find sufficiently proves the service of a copy of the petition upon Charles S. Burton, the counsel for the appellee.

It was impossible for me to get back from Chicago an acceptance of service of the petition and notice upon Mr. Burton. But he has informed me in writing that the appellee will not actively oppose the granting of such a petition; and he has also informed me that he presumes there will be no occasion for anyone on behalf of the appellee to be present when my petition is presented.

Yours very truly,

Albert H. Walker

P.S. The papers also show service of the motion

Livingston Gifford.
J.C.

Washington, D.C.

1
2

January 8, 1908.

Livingston Gifford, Esq.,
New York City.

Dear Sir:-

Yours of the 6th inst., received.

I send you by same mail two copies of brief filed for appellee in cases of White-Smith Music Publishing Co., vs Apollo Co., Nos. 110-11, Oct. Term, 1907. No briefs have as yet been filed by Mr. Walker or Mr. Pound.

After my letter of October 29 was written, on a consultation in the office, the two musical compositions attached to the stipulation were deemed by me to be exhibits and we concluded that it was not necessary to reproduce them, in view of the expense of such reproduction, and I should have written to you to this effect, and stated that it would be sufficient for you to furnish nine copies each of said musical compositions for the use of the Justices. If you can furnish these copies, please do so; if not, I have no doubt that the two compositions now in my possession will be deemed by the Court to be exhibits and will be examined by the Justices, if necessary.

Yours truly,

Jas. H. McKenney
Clerk, Supreme Court, U.S.
per H.C.M.

Livingston Gifford.
J. Edgar Bull.

110
2038

Gifford & Bull,

Counsellors at Law.

New York, January 6, 1

White-Smith Co. v. Apollo Co.
Nos. 110-111

James H. McKenney Esq.
Washington, D.C.

Dear Sir:-

As soon as the brief for the appellee has been filed, will you have the kindness to send me a copy and, if possible, two copies of the same.

Leave has been obtained from the Court for two other briefs to be filed--one by Mr Albert H. Walker and the other by Mr Geo. W. Pound. If I am entitled to it, I would also be very much obliged if you would send me one or two copies of each of these briefs as soon as filed.

In your letter of October 29, you acknowledged the receipt of the two musical compositions in suit with stipulation that they should be added to the record and you stated that if you found that the deposit already made was not sufficient to cover the cost of reproducing you would call upon me for an additional deposit. Not having heard from you to the contrary, I assume that you have had these reproduced and added to the record.

Yours truly,

Livingston Gifford

Albert H. Walker
Counsellor at Law
[illegible]

110
20

[illegible] New York Life Building, Manhattan, New York

August 23, 1907.

Albert H. Walker, Esq.,

New York City.

Dear Sir:-

Yours of the 22d inst., received.

The two cases of White-Smith Music Publishing Co., v. Apollo Co., Nos. 110-11, Oct. Term, 1907, will probably be reached for hearing some time between t he middle and latter part of November next.

Yours truly,

James McKenney

Clerk, Supreme Court, U.S.

per H.C.M.

Mca Stat Nov

Albert A. Walker
Counselor at Law

110 & 112
No 2827

Floor 10 Park Row Building, Manhattan, New York

August 22, 1907.

James H. McKenney, Esq.,
Clerk U. S. Supreme Court,
Washington, D. C.

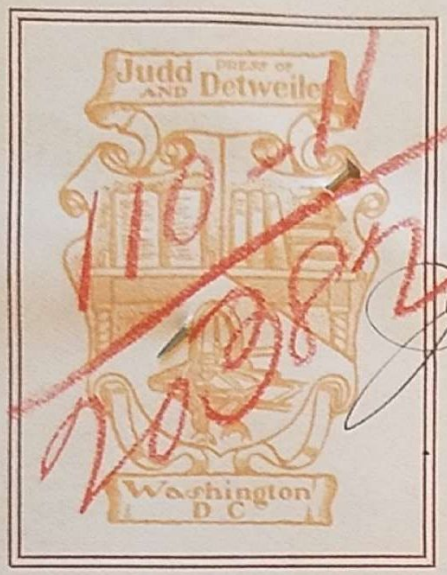
Dear Sir:-

Please write me what is the present number of the case of the White-Smith Publishing Company against the Apollo Company, and also please to inform me your estimate of the time when that case will be reached for argument.

Yours very truly,

Albert A. Walker

Mea Stat Nov



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Punctuality
Fair Prices

110 98

Washington, D. C., Sept. 21 1907

James H. McKenney, Esq.,
Clerk Sup. Court U.S.

To Judd & Detweiler, Dr.

INCORPORATED

Phone ... Main 536

420 and 422 Eleventh Street N.W.

5 extra copies of record in White-Smith Music Publishing Co. v. Apollo Company, Nos 110-11-O.T. 07	$25 00

OFFICE SUPREME COURT U. S.
PAID
OCT 1 - 1907
JAMES H. McKENNEY, CLERK.

RECEIVED PAYMENT
OCT 1 1907
JUDD & DETWEILER, Inc.
For Edwin Judd

Edward
Edwin
Louis C
Harold

September 27, 1906.

Dickerson, Brown, Raegener & Binney, Esqs.,

New York City.

Gentlemen:-

Yours of the 26th inst., enclosing check for $25.00, also package by express containing transcript of record on the two appeals in the cases of White-Smith Music Publishing Co Appellant, v. Apollo Co., received.

As an investigation of the transcript of the record discloses the fact that there are two separate cases in the one record, it will be necessary to furnish an additional deposit of $25.00 on account of costs. It is also necessary to have an appearance entered by a member of the bar of this court for the appellant, for which purpose I enclose two appearance forms. On receipt of these forms, properly signed, and a check for $25.00 the cases will be docketed.

Yours truly,

James H. McKenney

Clerk, Supreme Court, U.S.
per J.D.M.

Encl: Record
Check.

Dickerson, Brown, Raegener & Binney

Attorneys & Counsellors at Law,

Washington Life Building, 111 Broadway,

New York, Sept. 26, 190

Edward N. Dickerson.
Edwin H. Brown.
Louis C. Raegener.
Harold Binney.

OFFICE OF THE CLERK
RECEIVED
SEP 27 1906
SUPREME COURT U.S.

James H. McKenney, Esq.,

Clerk U. S. Supreme Court,

Washington, D. C.

Dear Sir:-

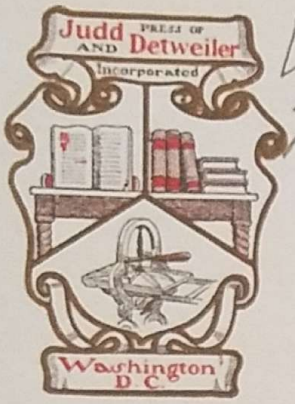
We beg to file herewith transcript of record in appeal to the Supreme Court of the United States from the Circuit Court of the United States for the Second Circuit, in the case of White-Smith Music Publishing Co. vs. The Apollo Co., two cases numbered 8126 and 8127 in the Circuit Court of Appeals. We also enclose check for $25.00 to pay docket fee and on account of costs. Please acknowledge receipt of the record, and docket the case as soon as possible. Also please send us estimate of printing at your convenience.

Very truly yours,

Dickerson, Brown, Raegener & Binney.

Cs.

Encl: Record
Check.



417
20382

Judd and Detweiler

INCORPORATED

Printers

420-422 Eleventh Street N. W.

Established 1868

Phone, Main 536

"Somebody in our office knows how"

Washington, D. C.,

Dec. 17th, 1906

Dear Mr. Stansbury

We have pleasure in submitting estimate for the cost of printing Record #417, (File # 20,382) in the case of

White-Smith Music PublishingCompany
vs.
Apollo Company

and we find as follows:

560 pages at $1.00 - - - - - -	$560.00
4 " " $5.00 - - - - - - -	20.00
Insert cuts - - - - - - -	3.75
Diagrams - - - - - - -	336.60
Binding - - - - - - -	17.50
6 pages of Index - - - - - -	15.00
Covers - - - - - - -	2.00
	$944.85

564 pages at 5 1/2

3102 folios

.15

15510
3102
465.30
50
515.30

Respectfully submitted:

JUDD & DETWEILER, Inc.

Herbert Judd
President

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

White-Smith Music Publishing Company, Appellant vs. The Apollo Company, Appellee	Nos. 110 & 111

It is stipulated and agreed by and between the counsel for the respective parties that the counsel for appellant may forward the Clerk of the Court specimens of "Little Cotton Dolly" and "[illegible]" notation to be added to the record.

Dated N.Y., October 18, 1907

Counsel for Appellant

Counsel for Appellee

United States of America, ss:

The President of the United States of America,

To the Honorable the Judges of the Circuit----------

(S E A L) *Court of the United States for the* Southern----------

District of New York,----------

GREETING:

Whereas, *lately in the United States Circuit Court of Appeals for the* Second---------- *Circuit, in a cause between* White-Smith Music Publishing Company, appellant, and Apollo Company, appellee, (8126), where in the decree of the said Circuit Court of Appeals, entered in said cause on the 11th day of June, A.D. 1906, is in the following words, viz:

"This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

W. H. T."

as by the inspection of the transcript of the record of the said United States Circuit Court of Appeals which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of an appeal and a writ of certiorari----------

---

agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and seven---------- , the said cause came on to be heard before the said SUPREME COURT, on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered,---------- adjudged, and decreed---------- by this Court that the decree---------- of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, affirmed with costs; and that the said appellee, Apollo Company, recover against the said appellant----------

---------- for its costs herein expended and have execution therefor.

And it is further ordered, That this cause be, and the same is hereby, remanded to the Circuit------ Court of the United States for the Southern---- District of New York.

You, therefore, are hereby commanded that such execution and ---------- *proceedings be had in said cause,* ---------- ---------- *as according to right and justice, and the laws of the United States, ought to be had, the said* appeal and writ of certiorari *notwithstanding.*

Witness, *the Honorable* MELVILLE W. FULLER, *Chief Justice of the United States, the* 26th *day of* March ---------- *in the year of our Lord one thousand nine hundred and* eight.

COSTS OF appellee

Clerk - - - - -	$	paid
Printing Record - -	$	by
Attorney - - - -	$	appellant
	$	----------

Clerk of the Supreme Court of the United States.

File No. 20382

SUPREME COURT OF THE UNITED STATES.

No. 110, *October Term, 1907.*

White-Smith Music Publishing Co.

vs.

Apollo Company.

MANDATE.

Supreme Court of the United States,

No. 111, October Term, 1907.

White-Smith Music Publishing Company, Petitioner,

vs.

Apollo Company.

On Petition for writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit.

On consideration of the petition for a writ of certiorari herein to the United States Circuit Court of Appeals for the Second Circuit, and of the argument of counsel thereupon had, as well in support of as against the same, It is now here ordered by the Court that said petition be, and the same is hereby, granted, the record on appeal to stand as a return to the writ.

Per Mr. Justice Day.

February 24, 1908.

Supreme Court of the United States,

No. 111, October Term, 1907.

White-Smith Music Publishing Company, Appellant,

vs.

Apollo Company.

and writ of certiorari to
Appeal from the United States Circuit Court of Appeals for the Second Circuit.

This cause came on to be heard on the transcript of the record from the United States Circuit Court of Appeals for the Second Circuit, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said United States Circuit Court of Appeals in this cause be, and the same is hereby, affirmed with costs; and that this cause be, and the same is hereby, remanded to the Circuit Court of the United States for the Southern District of New York.

Per Mr. Justice Day

February 24, 1908.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1907.

In the matter of the petition of White-Smith Music Publishing Co. for a Writ of Certiorari directed to the United States Circuit Court of Appealsfor the Second Circuit and to the United States Circuit Cou rt for the Southern District of New York to bring before the said Supreme Court the case of White-Smith Music Publishing Co. vs. Apollo Company.

To APOLLO COMPANY, defendant and CHARLES S. BURTON, ESQ.of Counsel for defendant.

Please take notice that upon the copy of the Transcript of Record herein which is already in this Court on appeal and upon the annexed petition of the complainant, I shall move before the Supreme Court of the United States at the Capitol in the City of Washington,D.C. at the hearing of the defendant's motion to dismiss the appeal herein, for the grant of the prayer of the annexed petition for certiorari and for such other and further relief as to the Court may seem just.

Yours etc.,

Dated New York, Nov. 6th 1907.

Livingston Gifford

Of Counsel for Petitioner.

Service of a copy of the above notice and the annexed petition is admitted this 6th day of November 1907

Wilcox & Brodek Gf

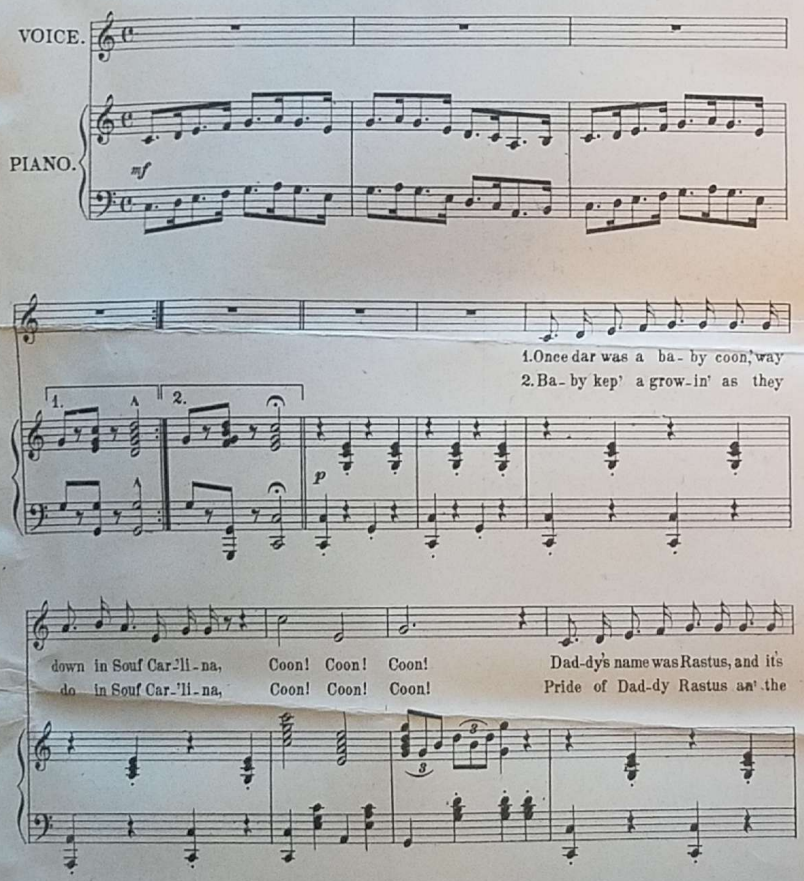
of Counsel for defendant

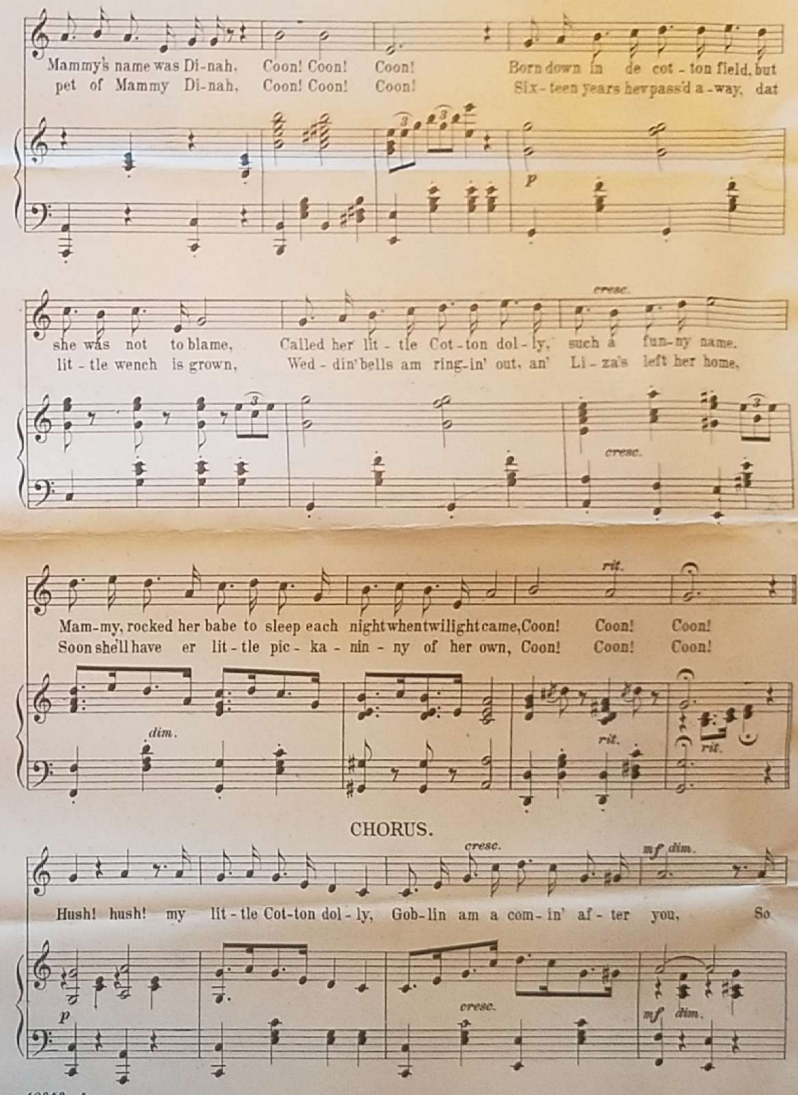
Composed expressly for and respectfully dedicated to
Miss ISADORE RUSH.

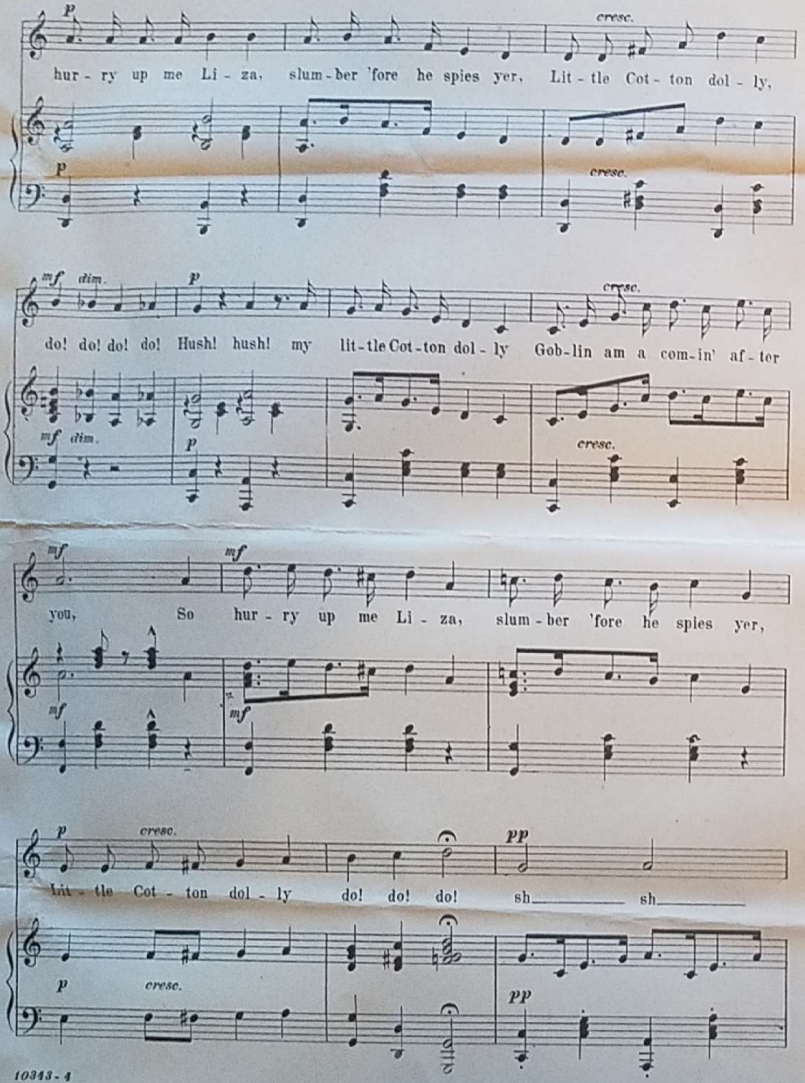
LITTLE COTTON DOLLY.

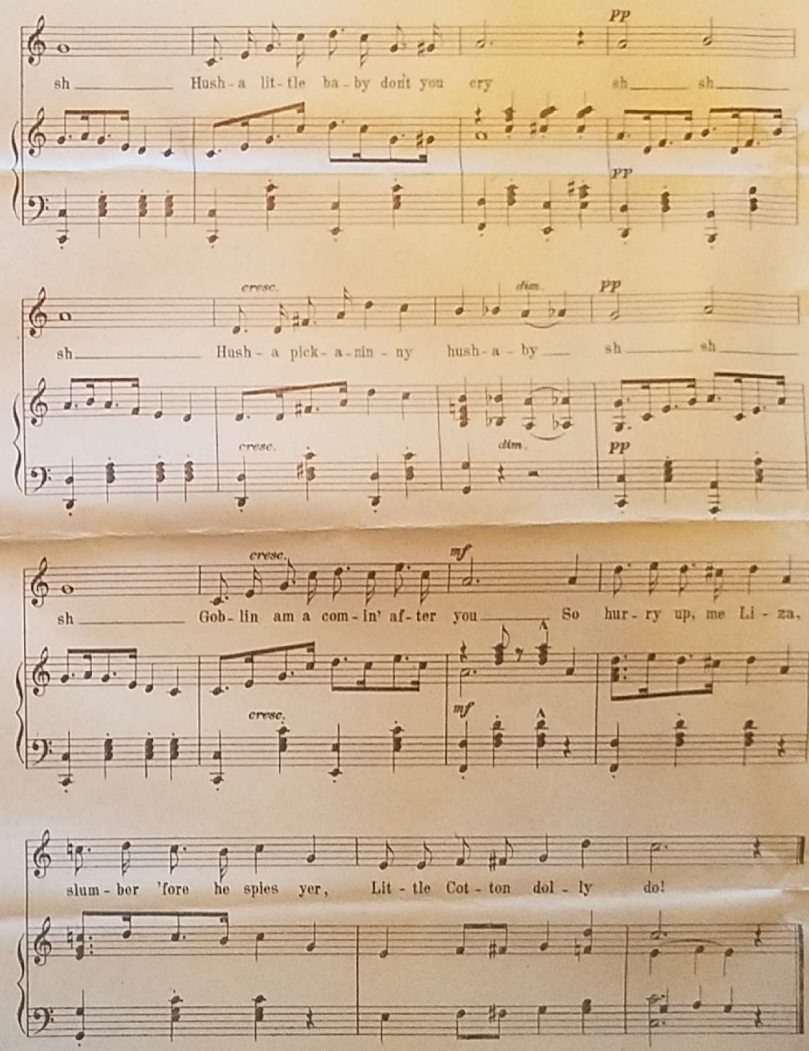
(PLANTATION LULLABY.)

Words by RICHARD HENRY BUCK. Music by ADAM GEIBEL.






hur - ry up me Li - za, slum - ber 'fore he spies yer, Lit - tle Cot - ton dol - ly,
do! do! do! do! Hush! hush! my lit - tle Cot - ton dol - ly Gob - lin am a com - in' af - ter
you, So hur - ry up me Li - za, slum - ber 'fore he spies yer,
Lit - tle Cot - ton dol - ly do! do! do! sh sh

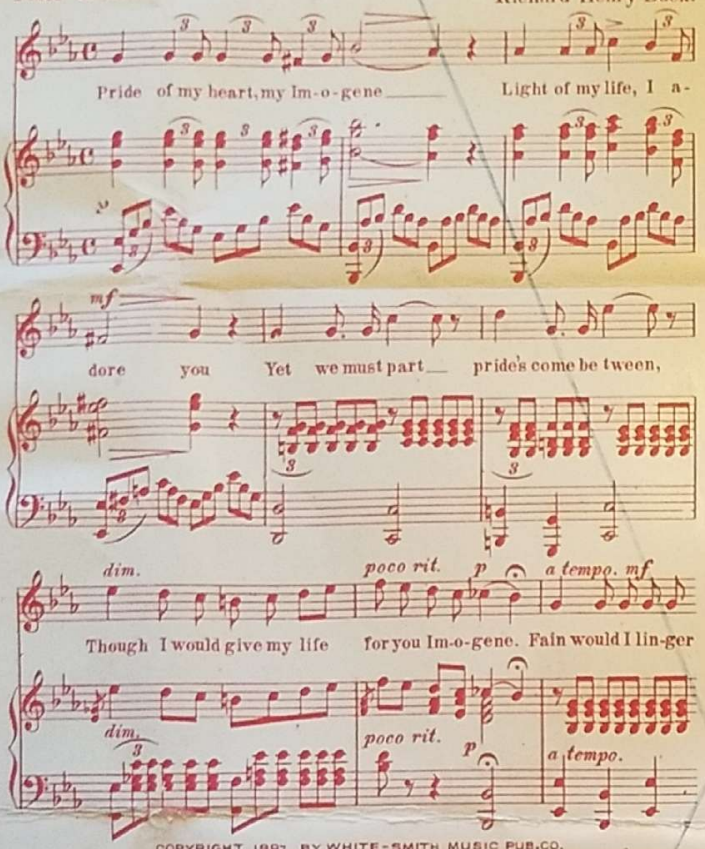

sh Hush - a lit - tle ba - by don't you cry sh sh
sh Hush - a pick - a - nin - ny hush - a - by sh sh
sh Gob - lin am a com - in' af - ter you So hur - ry up, me Li - za,
slum - ber 'fore he spies yer, Lit - tle Cot - ton dol - ly do!

SONGS BY ADAM GEIBEL.

Imogene.

Price 40 cents.

Words by
Richard Henry Buck.

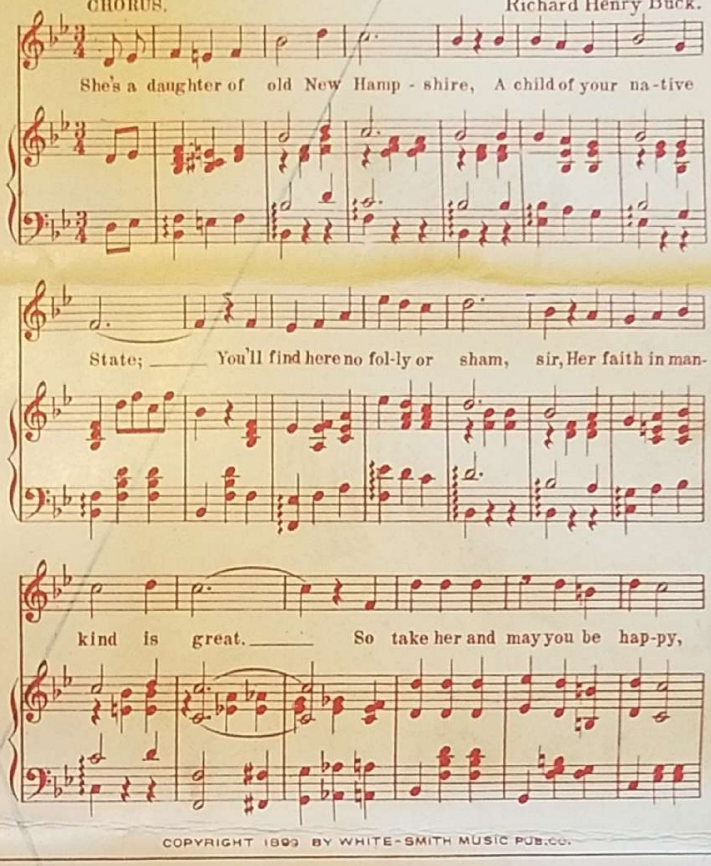


A Daughter of old New Hampshire.

Price 50 cents.

CHORUS.

Words by
Richard Henry Buck.



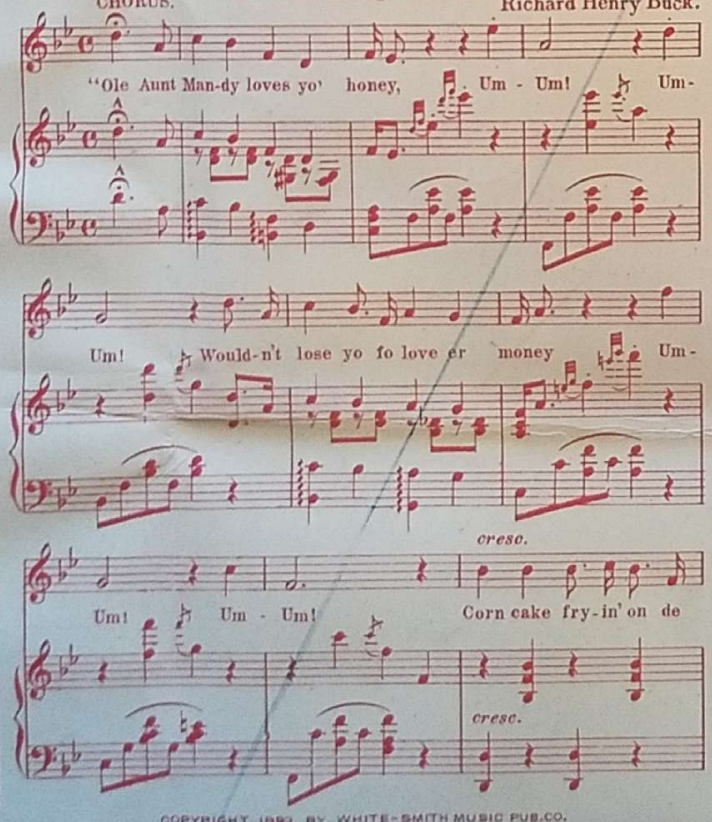
Ole Aunt Mandy's Chile.

Price 50 cents.

CHORUS.

Plantation Song & Chorus.

Words by
Richard Henry Buck.



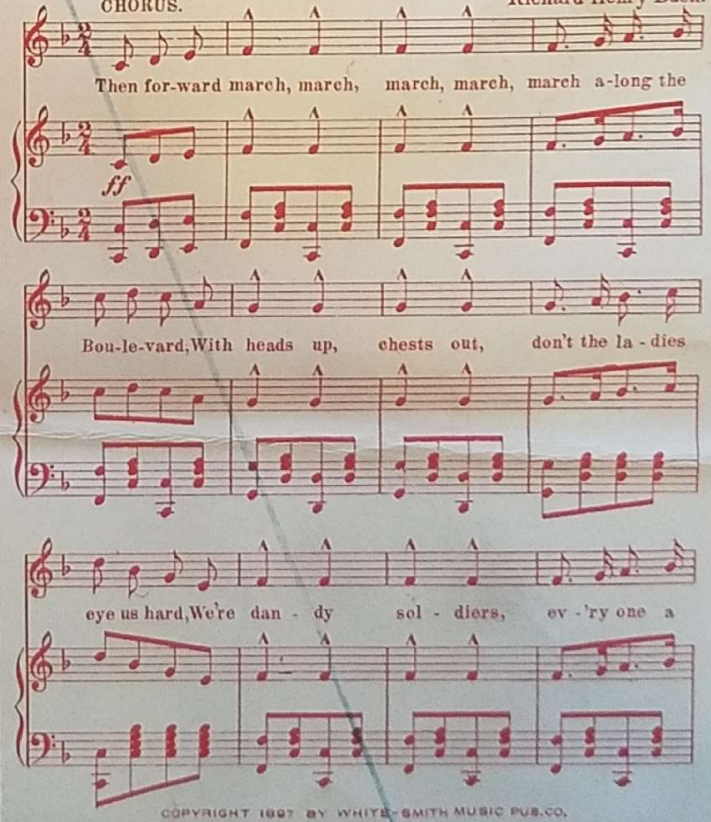
National Guard Patrol.

Price 50 cents.

CHORUS.

March Song & Chorus.

Words by
Richard Henry Buck.



TRY THIS ON YOUR PIANO

BETWEEN THE ACTS.

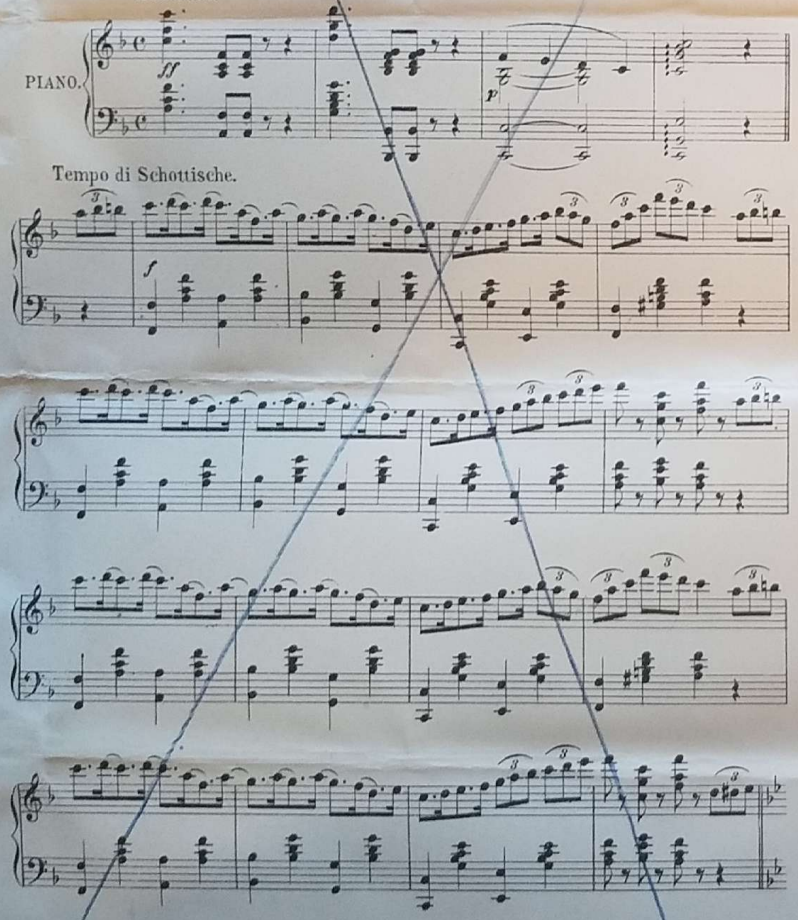
WOODEN SHOE DANCE.

HARRY S. ROMAINE.
Author of "Frolic of the Brownies."

Moderato.

PIANO.

Tempo di Schottische.



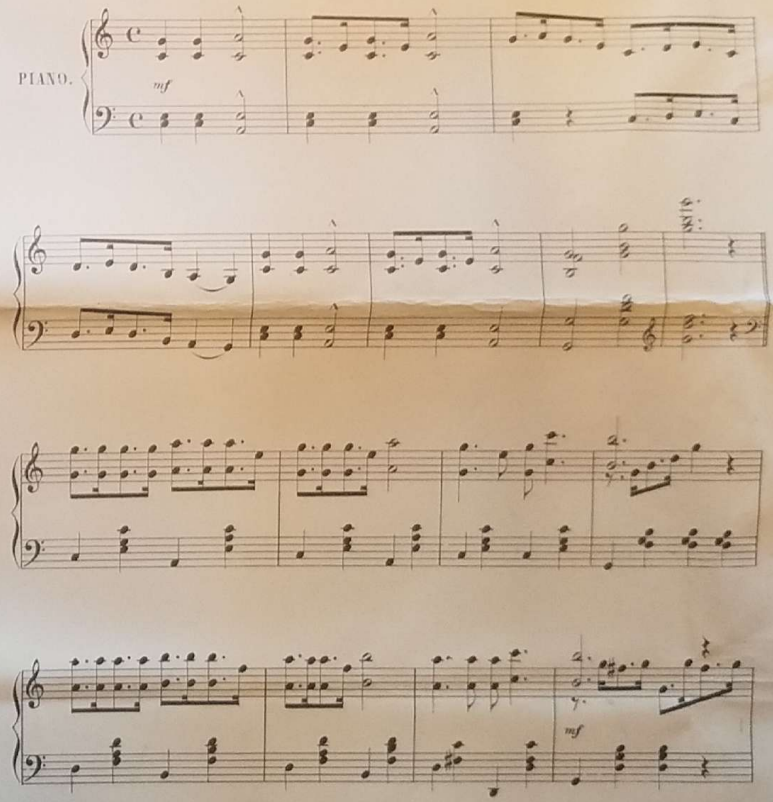
11092-3

KENTUCKY BABE.

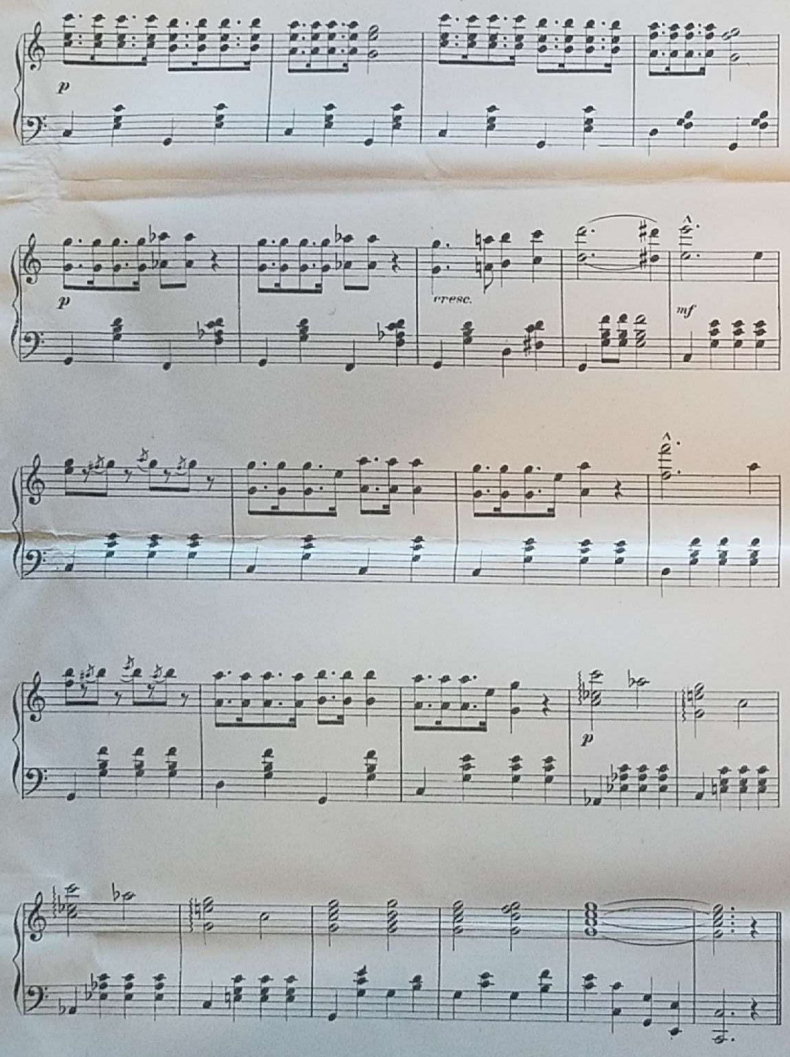
Schottische.

By ADAM GEIBEL

PIANO.



10150-3


p
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mf
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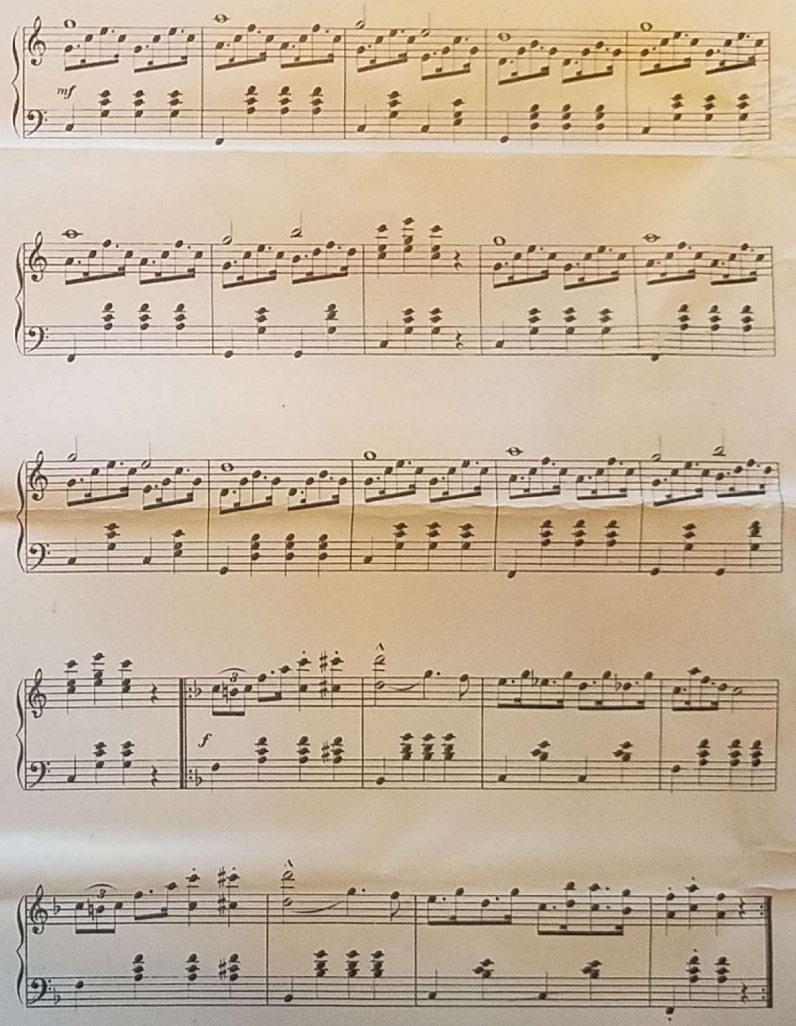
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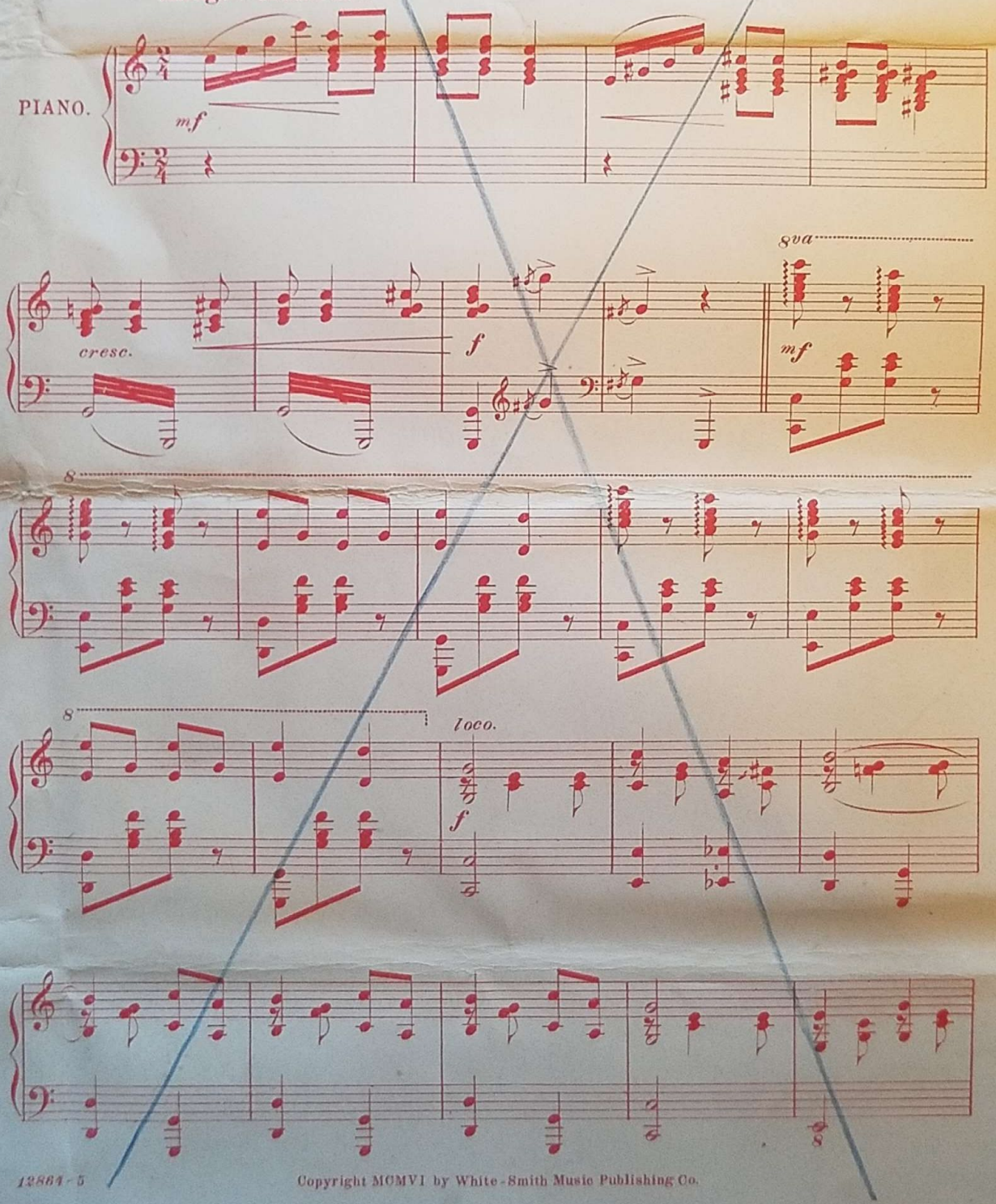
TRY THIS ON YOUR PIANO

IN MOON-LAND.

INTERMEZZO. TWO-STEP.

Allegro Moderato.

HARRIE A. PECK.



12884-5

SECOND CIRCUIT.

White Smith Music Publishing Company,

vs.

Apollo Company.

In Equity
No. 8127.

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the affidavit of Adam Geibel, sworn to the 30th day of January 1904, on page 236 of the complainant's record in this court, be inserted in the record on appeal of the above entitled action to the United States Circuit Court of Appeals immediately after the last printed page thereof.

Dated New York, April 25th, 1906.

Dickerson, Brown,

Petition of the Automusic Perforating Company to be heard

To the Judges of the Circuit Court of Appeals of the United States, for the Second Circuit.

Your petitioner the Automusic Perforating Company, respectfully represents that it is a corporation, created and existing in due form of law in the State of New York, and having a place of business at 53 Broadway, New York, and another place of business at 227 Bleeker Street, New York; and that it is pecuniarily interested to a large amount in the decisi n of this suit; and that if that decision is to be in favor of the appellant, the White-Smith Music Publishing Company, the resulting pecuniary injury to your petitioner will be very great.

Wherefore, your petitioner respectfully prays that your petitioner may be heard by the Court, before any decision in the case is rendered by the Court; and your petitioner also prays for such other relief, as to the Court may appear to be proper.

And, in support and explanation of this petition, your petitioner respectfully represents the following facts:

First:- Your petitioner's business consists mainly in making and selling special sheets of perforated paper, for use in automatic musical instruments; which sheets are cov-

ered by letters patent of the United States, No. 661,920, granted November 13, 1900, to James O'Connor, and which sheets are usable only with a particular construction in automatic musical instruments/ and which construction is also covered by said letters patent.

Second:- Your petitioner conducts its business by a contract with each of a number of manufacturers of automatic musical instruments; each of which contracts includes a license to that manufacturer to make and sell that patented construction, in the instruments of the licensee, and includes an agreement for the purchase, by that licensee or its agents, from your petitioner, of all the sheets of perforated paper which are to be sold with or for those instruments, which agreement is occasioned by the fact that the said patented construction is in the said instruments, requires the said patented perforated sheets for use therewith.

Third:- The property of your petitioner which is employed in its said business, consists of machinery, master sheets, and perforated sheets, and other tangible personal property, together with the said letters patent; and that tangible personal property had cost the petitioner nearly one hundred thousand dollars; and those letters patent are very valuable to your petitioner's business.

Fourth:-The Aeolian Company, of Meriden, Connecticut, is a large and wealthy corporation, which is engaged in making and selling automatic Musical instruments, and in making and selling perforated strips of paper for use in those instruments.

Fifth:-There is an association of publishers of sheet music, which association includes nearly all the principal music publishers in the United States, and the members of which association copyright and publish most of the sheet music which is copyrighted and published, from time to

time in this country.

Sixth:- The Aeolian Company has a contract with each member of said association of music publishers, which contract substantially provides that the Aeolian Company shall have the exclusive right to make and sell perforated sheets of paper, to be used in automatic musical instruments, for producing the music represented by any or all of the copyrighted sheet music published by that publisher; provided the Aeolian Company can and does cause a decree to be obtained in some Federal Court, declaring such a perforated sheet to be an infringement of such a copyright; or, failing to obtain such a decree, provided the Aeolian Company shall succeed in inducing Congress to enact a statute, to subject such perforated sheets to the dominion of such copyrights; but which contract also provides that the Aeolian Company shall not be obliged to make or sell any perforated sheet of paper to be used in producing the music represented by any particular copyrighted sheet music, or pay any royalty thereon, unless it elects to thus make and sell such particular perforated sheet.

Seventh:- This action was actually begun, and has been really prosecuted by the Aeolian Company, in the name of the White Smith Music Publishing Company, but at the expense of the Aeolian Company, for the purpose of obtaining such a judicial decree as is contemplated by each of said contracts.

Eighth:- If this case is decided in favor of the appellant, all of those contracts will be thereby put into operation, and will operate to give the Aeolian Company the exclusive right to make and sell perforated sheets, for use in automatic musical instruments, to perform most of the music which the owner of such an instrument would desire to have performed thereby. The monopoly of the right to make and sell most of the perforated sheets which

conferring upon the Aeolian Company a monopoly to make and sell all of the perforated sheets which the public would wish to buy, and also a practical monopoly of making and selling all automatic musical instruments, operated by perforated sheets of paper; because no prospective purchaser of an automatic musical instrument would buy one which could be used by him in playing only a comparitively few tunes, when he could purchase one from the Aeolian Company even at a higher price, for playing all the tunes which he would desire to have played; and because the Aeolian Company could present this dilemma to every prospective purchaser of an automatic musical instrument, by simply declining to sell any perforated sheets for use in any instrument not made and sold by that company.

Ninth: Your petitioner's said business would probably be quite extinguished by a decision of this suit in favor of

ent, and would drive your petitioner out of the business which it has been building up in good faith, on the authority of said letters patent, and in reliance on the decision of his Honor, Judge Colt, in the case of Kennedy vs McTammany, and would also deprive your petitioner of all future profits which it would otherwise derive from that business.

Tenth: Even if the decision of this case in favor of the appellant should not thus result in immediately ruining your petitioner's business, through threats or warnings from the Aeolian Company to your petitioner's customers, that result would doubtless speedily follow from one or more preliminary injunctions, issued against your petitioner, or against some or all of its said customers, on the basis of such a decision of this case.

WHEREFORE your petitioner again prays, as it has already prayed, that your petitioner may be heard by the Court, before any decision in this case is rendered by the Court, and your petitioner also prays for such other relief, as to the Court may appear to be proper.

Automusic Perforating Co.,

James O'Connor, President.

Albert H. Walker,

Counsel for Petitioner.

State of New York
ss
County of New York

James O'Connor being duly sworn, deposes and says That he is the president of the petitioner, the Automusic Perforating Company; and that he has read the foregoing petition and known the contents thereof; and that all the statements in the introduction to said petition, and all those in the first, second and third sections of said petition are true of his own knowledge; and that all its

which information was carefully acquired, and which belief is founded upon convincing evidence.

James O'Connor.

Subscribed and sworn to before me
this nineteenth day of April, 1906.

Narciso C. Donato,
Notary Public
New York County.

(Seal)

ENDORSED:- U. S. Circuit Court of Appeals for the Scond Circuit. White Smith Music Publishing Company vs The Apollo Company, No 8126. Petition of the Automusic Perforating Co. to be heard. United States Circuit Court of Ap peals Seond Circuit. Filed Apr. 20, 1906. William Parkin, Clerk.

White-Smith Music Publishing Company,

Appellant

vs.

THE APOLLO COMPANY,

Appellee.

IN EQUITY

No. 8126

NOW ALL MEN BY THESE PRESENTS, hat we, the AMERICAN SURETY COMPANY OF NEW YORK, a corporation organized and existing under the laws of the State of New ork, of No.100 Broadway, New York City, are held and firmly ound unto THE APOLLO COMPANY, in the sum of TWO HUNDRED AND IFTY DOLLARS ($250.), to be paid to the said Apollo Company, or the payment of which well and truly to be made, we bind urselves, and our successors, firmly by these presents.

Sealed with our seals and dated the 31st day of August, 1906

WHEREAS an appeal has been allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Second Circuit in the above entitled case to correct the judgment in aforesaid suit and the citation directed to the said The Apollo Company, citing and adminishing it to be and appear at a Supreme Court of the United States, at Washington, in the District of Columbia, within thirty days from the date thereof.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said White-Smith Music Publishing Company shall prosecute said appeal to effect, and answer all damages and costs if it fail to make its plea good, then this obligation shall be void; otherwise we, the American Surety Company of New York, shall do the same for them.

AMERICAN SURETY COMPANY OF NEW YORK,
by L. E. Carman.

Vice President

J. C. Darney
Attorney.

L. S.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK. } ss.

I, WILLIAM PARKIN, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 785 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

White-Smith Music Publishing Co.,

against

Apollo Company.

(2 cases)

as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of ~~September~~ May in the year of our Lord One Thousand ~~Eight~~, Hundred and ~~Ninety~~ six and of the Independence of the said United States the One Hundred and thirty-first.

Wm. Parkin

Clerk.

File Nos. 20,382 and 20,383.

TRANSCRIPT OF RECORD.

Supreme Court of the United States,

OCTOBER TERM, 1907

Term Nos. 110 and 111.

White-Smith Music Publishing Company, Appellant,

vs.

Apollo Company.

Motions to dismiss; affidavits in support of same, notices and proof of service.

Filed October 14th, 1907

( )

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D., 1907.

WHITE-SMITH MUSIC PUBLISHING CO., Appellant, vs. APOLLO COMPANY, Appellee.	Appeal from United States Circuit Court of Appeals, Second Circuit. Case No. 110.

MOTION TO DISMISS APPEAL.

Comes now the Appellee Apollo Company, and moves the Court to dismiss the appeal in this case for want of jurisdiction, because the matter in dispute, exclusive of costs, in said case does not exceed the sum or value of One Thousand Dollars ($1000.00).

And forasmuch as the record in said case contains nothing showing or tending to show or indicate the sum or value of the matter in dispute, the said Appellee craves leave to file the accompanying affidavits of E. G. Clark, A. N. Page, E. B. Bartlett, Adolf Janson, Fred Kann, W. F. Wallace and C. H. Davis tending to show said sum or value, together with proof of service of copies of the same upon Appellant's Counsel.

Charles D. Burton
Counsel for Appellee for the Purposes of this Motion.

To GIFFORD & BULL,
141 Broadway, New York City.

Please take notice that on Monday, the 21st day of October, A. D., 1907, the Motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States, together with the affidavits therein mentioned for the decision of the Court thereon.

Annexed hereto is a copy of my Brief or Argument in support of said Motion.

Charles D. Burton
Counsel for Appellee for the Purposes of this Motion.

Received copy of the foregoing Motion and of the affidavits and Brief or Argument in support of same.

New York City, Sept. 24, 1907.

Livingston Gifford
Of Counsel for Appellant.

originals

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D., 1907.

WHITE-SMITH MUSIC PUBLISHING CO.,
Appellant,
vs.
APOLLO COMPANY,
Appellee.

Appeal from United States Circuit Court of Appeals, Second ~~District~~ Circuit

Case No. 111.

MOTION TO DISMISS APPEAL.

Comes now the Appellee Apollo Company, and moves the Court to dismiss the appeal in this case for want of jurisdiction, because the matter in dispute, exclusive of costs, in said case does not exceed the sum or value of One Thousand Dollars ($1000.00).

And forasmuch as the record in said case contains nothing showing or tending to show or indicate the sum or value of the matter in dispute, the said Appellee craves leave to file the accompanying affidavits of E. G. Clark, A. N. Page, E. B. Bartlett, Adolf Janson, Fred Kann, W. A. Wallace and S. R. Davis tending to show said sum or value, together with proof of service of copies of the same upon Appellant's Counsel.

Charles D. Burton
Counsel for Appellee for the Purposes of this Motion.

To GIFFORD & BULL,
141 Broadway, New York City.

Please take notice that on Monday, the 21st day of October, A. D., 1907, the Motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States, together with the affidavits therein mentioned for the decision of the Court thereon.

Annexed hereto is a copy of my Brief or Argument in support of said Motion.

Charles D. Burton
Counsel for Appellee for the Purposes of this Motion.

Received copy of the foregoing Motion and of the affidavits and Brief or Argument in support of same.

New York City, Sept. 24, 1907.

Livingston Gifford.
Of Counsel for Appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1907.

WHITE-SMITH PUBLISHING CO., Appellant, vs. APOLLO COMPANY, Appellee.	) ( ) ( ) (	Appeal from United States Circuit Court of Appeals, Second Circuit. No. 110

State of New York)
(SS.
County of New York,)

WILLARD F. WALLACE, being first duly sworn, deposes and says, that he is connected with the Perforated Music Roll Company of New Jersey, of which he is the Treasurer.

That he has been connected with the business of manufacturing and marketing perforated music rolls for automatic musical instruments for 1 1/2 years last past, and that he has been connected with the said Perforated Music Roll Company since Mar. 1906; and that he is thoroughly familiar with the demand for and sales of the perforated rolls of that Company, and with the conditions affecting the prices and profits obtainable and with the cost of manufacture of said rolls, and with all the facts and circumstances and conditions which might affect the value to the manufacturer of the privilege of making and selling such rolls for any particular piece of music.

This affiant further says that the compositions entitled "Kentucky Babe Schottische" and "Little Cotton Dolly" which are involved in the above entitled suits were catalogued by the Perforated Music Roll Company when this affiant first became connected with said Company and remained in the catalogue of said Company and subject to orders of customers to date but that during the entire period of this affiant's connection with said Company there has been little or no demand or inquiry for said "Kentucky Babe Schottische" or "Little Cotton Dolly" rolls.

This affiant further says that both said "Kentucky Babe Schottische" and said "Little Cotton Dolly" were considered "Poor Sellers." This affiant further says that any piece of music of the class commonly called "Popular", to which said "Kentucky Babe Schottische" and "Little Cotton Dolly" belong, perforated rolls for which were sold up to or near to the number of one hundred (100) would be classed as a fair or good seller, and that the fact that both said pieces were considered as poor sellers, indicates that the sales of rolls for each of said pieces would fall considerably below one hundred (100) rolls during the entire period of their salability, which had practically ended before this affiant became connected with said Company, that is, 1 1/2 years ago.

This affiant further says that there is no custom or usage of the business by which the value of the right or privilege of making or selling such perforated rolls for any particular composition could be calculated; that except as to an occasional rare or exceptionally popular composition, or one which has been exploited by public performance or other means of advertising, composers generally are willing to have perforated rolls for playing their compositions of the class of "Popular" music, made without any compensation to them for the privilege; and makers of such perforated rolls can at all times have a full supply of such popular music for their catalogue without compensation, because composers generally are desirous of having their music exploited or advertised by means of automatic instruments, using such perforated rolls; and that such has been the case throughout the entire period of this affiant's connection with said business.

This affiant further says that the period of popularity and salability of the perforated rolls for playing music of the class known as "popular", including such pieces as "Kentucky Babe Schottische" and "Little Cotton Dolly", seldom

in any one locality exceeds six months; that only the exceptional or exceptionally exploited pieces last in respect to salability as long as one year; that during the second year after their first introduction the sales, in majority of instances, do not cover more than the expense of handling, and that sales generally cease altogether after the second year, - or in the case of a piece of more than ordinary popularity, after the third year, and this affiant says therefore that the total number of sales of perforated rolls for any such piece made within two or three years after its first introduction may be safely counted and may correctly be regarded as exhausting its salability; and that the entire profit which can be made by making and selling such rolls is made usually within the first year and almost invariably within the first two years, and that any stock of such rolls remaining on hand at the end of the third year has only the value of waste paper and the right or privilege of selling them is therefore of absolutely no value.

This affiant further says that the average worth or value to a maker of such perforated rolls of the right or privilege of making and selling the same in the case of "Popular" musical compositions of average popularity for automatic playing and of which the perforated rolls for such playing would have average salability, is in any event a very small amount, even for the full period of popularity and salability. And this affiant says that while it is not possible to fix definitely the value of such privilege with respect to "Kentucky Babe Schottische" and "Little Cotton Dolly", this affiant is unhesitatingly of the opinion that such right or privilege with respect to either of said pieces was never worth so much as Ten Dollars ($10.), for this affiant says that said pieces being of only average salability in perforated rolls, could be not worth more than the average of the entire class of

"Popular" music to which they belong, and that an average charge of Ten Dollars ($10.) for the privilege of cutting and selling perforated rolls for this class of music would extinguish the entire profits of the business and would therefore be absolutely prohibitive.

This affiant further says that the value of the right or privilege of cutting and selling perforated rolls for any particular piece of "Popular" music estimated on the basis of the aggregate sales of such rolls is in any event only a very small percentage of the profits made on such sales; for this affiant says that the lack of any particular piece from the catalogue of stock of the maker or dealer in perforated rolls does not entail the loss of sales to the number of rolls which would be sold of that particular piece if it were in stock or catalogue, but only the loss of the very small percentage of sales consisting of those which will be called for by customers desiring that particular piece and who would not be satisfied with any other piece of the same general character or appealing to the same taste; for this affiant says that the demand of customers in each instance of purchase of rolls is usually only for the music of a certain sort or general character and that, lacking any particular piece of the character desired, they are satisfied with another piece of the same general character, so that each dealer sells to his customers the pieces which he has in stock of the character sought for and does not lose the sale because he does not happen to have a particular piece which may have been mentioned; and this affiant says that the percentage of calls which could be satisfied only with a particular piece called for is very small indeed, and would not warrant any maker or dealer in perforated rolls in paying more than five per cent. or at the utmost ten per cent. on the <u>net profits</u> which he could make on all the sales of rolls for that piece of music.

This affiant therefore says that the privilege of making and selling perforated rolls for "Kentucky Babe Schottische" or the like privilege with respect to "Little Cotton Dolly" is not now worth any sum whatever to any maker of perforated rolls or dealer therein; and that for the same reasons the exclusive right or privilege of making and selling such rolls for said pieces is at this time of absolutely no value; and tha same is true without regard to the length of time in the future through which such privilege exclusive or non-exclusive might continue; because this affiant says that in all his experience in the making and handling of perforated rolls, there has never to his knowledge been an instance of revival or return of salability of the perforated rolls of a piece of music of which such rolls had passed through one period of salability and become "dead" or unsalable.

Willard F. Wallace

Subscribed and sworn to before me this
20th day of September, 1907.

Jacob H. Gorb

COMMISSIONER OF DEEDS,
NEW YORK CITY.

JACOB H. GORB
COMMISSIONER
OF
DEEDS
NEW YORK CITY

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, A.D., 1907.

WHITE-SMITH MUSIC PUBLISHING CO., Appellant,	)	
vs.	)	Appeal from United States Circuit Court of Appeals, Second Circuit.
THE APOLLO COMPANY, Appellee.	)	No. 110.

STATE OF ILLINOIS,)
) SS.
COUNTY OF COOK.)

ERNEST G. CLARK, being first duly sworn, deposes and says that he is familiar with the perforated paper-controlling sheets, commonly called music rolls or perforated rolls, made and used for the purpose of playing automatically upon a piano the piece of music known as "Little Cotton Dolly", and which is involved in controversy in the above entitled suit; that the perforated roll, Complainant's Exhibit No. 12 in said suit, and others like it, were made by the Q R S Company, a corporation of the State of Illinois, having its office at Chicago, Illinois, and factory at De Kalb, Illinois; that this affiant is its President and has been its President since its organization, and during the entire period of the operation of said Company has had practical charge of its affairs, both in the manufacturing and distributing of its products.

This affiant says that the perforated rolls made by said Company for playing "Little Cotton Dolly", of which the Complainant's Exhibit No. 12 is one, are designated by said Q R S Company in its catalogue and accounts as No. 4559; and that all the perforated rolls made by said Q R S Company for playing said music entitled "Little Cotton Dolly" are known and numbered as No. 4559, and that the entire number of

such "Little Cotton Dolly" rolls No. 4559 which said Q R S Company has ever made, up to this time, amount to One Hundred Twenty (120)rolls and no more.

This affiant further says that the records of said Q R S Company, kept under the direction of and now in the custody and control of this affiant, show all the sales and deliveries of said "Little Cotton Dolly" rolls, and that the total number of rolls sold and delivered, or in any manner furnished to any parties from the date of the first cutting of said rolls down to the present time, is Sixty-Four (64) rolls and no more, and that of said Sixty-Four (64) rolls Twelve (12) rolls were sent to foreign countries and only Fifty-two (52) rolls were sold or delivered for use in the United States; and that said Q R S Company has now on hand remaining unsold Forty-Two (42) out of said One Hundred Twenty (120) rolls of "Little Cotton Dolly" No. 4559, and that the remaining Fourteen(14) rolls out of said total of One Hundred Twenty (120) are accounted for as defective and discarded and thrown into waste paper upon inspection immediately after cutting by reason of flaws in the paper and short lengths, and as otherwise injured by handling in stock, and as used up in exhibiting players in the sales-room.

This affiant further says that upon the orders of the Melville Clark Piano Company said Q R S Company has furnished and sent to the Apollo Company of New York Eighteen (18) of said "Little Cotton Dolly" rolls No. 4559, which were forwarded to said Apollo Company at or about the following dates respectively:-

Feb. 13, 1902, 1 roll;
Mar. 15, " 2 "
Apr. 26, " 6 "
May 28, " 8 "
Nov. 15, 1904, 1 "

and this affiant says that said Eighteen (18) rolls constitute the entire number of such "Little Cotton Dolly" rolls which have ever been furnished or sent directly or indirectly to said Apollo Company of New York by said Q R S Company.

And this affiant further says that the price at which said "Little Cotton Dolly" rolls No. 4559 were sold to said Apollo Company of New York was Sixty Cents (60¢) each, and that the manufacturing cost of said rolls, including boxing, was about Thirty-Five Cents (35¢) each, and that all of said rolls were furnished boxed in the manner of said Complainant's Exhibit No. 12.

This affiant further says that the retail selling price of said "Little Cotton Dolly" rolls No. 4559 was plainly published in the catalog of such rolls furnished to such Apollo Company, and that the retail price so published was One Dollar and Eighty Cents ($1.80) each.

This affiant further says that he is familiar with the method and course of business of the Apollo Company of New York and with the general range and character of the expense involved in carrying on said retail business and particularly in the sale of perforated rolls, and that according to his best information and belief the margin of profit to said Apollo Company of New York per roll, during the entire period of the sale of such rolls, was about double that of the Q R S Company on the same rolls, and that said Apollo Company has during said period handled not to exceed One-Tenth (1/10) of the entire output of the perforated rolls of the Q R S Company, and that therefore the value to the Apollo Company of the right to sell such perforated rolls is not, and has not been at any time, more than One-Fifth (1/5) the value to the Q R S Company of the right to make and sell the same rolls.

This affiant further says that there is no usage or custom of the business by means of which to calculate the val-

ue of the privilege in question with respect to any particular piece of music if such privilege has any commercial value, but the value of such right or privilege might be estimated in advance in either one of two ways:

First, by taking into account the probable total sales of such rolls based upon the average experience with respect to music of like class and equal popularity, and allowing a certain percentage upon such estimated probable sales; and in the opinion of this affiant, according to this method the value of the right or privilege could not in any case exceed Ten Per Cent. (10%) of the estimated sales;

Second, by ascertaining what amount the business of making and selling such rolls could stand as an average price for all the compositions for which rolls are made and catalogued.

For the purpose of arriving at a valuation by the first method, this affiant says that the said piece of music, "Little Cotton Dolly", belongs to a class of so-called "popular music", and that the popularity or salability of perforated rolls for said "Little Cotton Dolly" is not above the average of all pieces of that class.

This affiant says that very few pieces of music of that class continue to be in demand or salable to any considerable extent longer than one or two years, and that the average life or period of salability of perforated rolls for such music for any one locality seldom exceeds a single season or period of six months; that inquiries for and sales of such rolls after the first six months from their introduction, except in case of a few of rare and exceptional merit and popularity, are only occasional; that such pieces frequently acquire popularity in a given locality, as on the Atlantic Coast, several months before they become known at all in more

remote localities, so that a piece whose popularity has practically ceased at New York City may be acquiring its first popularity at San Francisco, and that the average period of salability of such pieces from the time of their earliest popularity at the locality where they are first introduced in the United States to the end of the period of profitable salability at the locality where they are last introduced in the United States does not ordinarily exceed one year.

This affiant further says that the average total number of rolls sold by the Q R S Company of any one composition of the class of "popular music", to which said "Little Cotton Dolly" belongs, does not exceed One Hundred Fifty (150) rolls, and that in order to make an average so high as this, there must be included all the most popular rolls of that class; that of the rolls of average popularity, excluding a very small number of exceptional popularity, the average sale before their popularity ceases and they become unsalable does not exceed One Hundred (100) rolls; that the total retail selling price of that number of rolls of the length of "Little Cotton Dolly" rolls would be One Hundred Eighty Dollars ($180.00), the total price received by the Q R S Company Sixty Dollars ($60.00), and the valuation of said privilege upon the basis of Ten Per Cent. (10%) of the total sales would be Six Dollars ($6.00).

This affiant further says that upon a basis of the percentage on the total sales, it is possible at the present date to arrive at the valuation of that right or privilege with respect to "Little Cotton Dolly" rolls without any uncertainty such as is involved in estimating in advance the probable sales; for this affiant says that the rolls for "Little Cotton Dolly" were first cut by the Q R S Company in January, 1902; that it has been retained in the catalog subject to order and sale up to the present time, and that, with the exception of the one roll furnished to the Apollo Company of New

York November 15, 1904, (which this affiant understands was called for by reason of this litigation) the last order or request received by the Q R S Company for "Little Cotton Dolly" rolls was an order for one roll which was filled October 8, 1903, so that for a period of nearly four years while that piece has remained in the catalog there has been no demand for it.

This affiant therefore says that in his opinion the sales actually made, amounting, as above stated, to Sixty-Four (64) rolls, exhausted the salability of said rolls; that the total profit made by the Q R S Company on the entire number of said rolls sold could not possibly have exceeded Eighteen Dollars ($18.00). The total value of the entire sales did not exceed Forty-Two Dollars ($40.00), and on the basis of Ten Per Cent. (10%) royalty, the total value, therefore, of the privilege did not exceed Four Dollars ($4.00).

If the Apollo Company of New York had sold at the full catalog price the entire number of said rolls which it received from the Q R S Company (Eighteen of said rolls), the total gross profits of said Apollo Company on said sales, making no deduction for the expense or cost of sale, would have been only Twenty-One Dollars and Sixty Cents ($21.60), and the salability of said rolls being now ended, that sum less the cost of doing the business, exceeds the total maximum possible value to that Company of the right or privilege of selling said rolls.

Upon the basis of the second suggested method of arriving at the valuation of said right or privilege, - viz., the amount that the business could stand as a lump price for such right, - this affiant says that the total number of pieces for which perforated rolls are made by the Q R S Company and carried in its catalog is about Twelve Thousand (12,000); that this number includes a large percentage of classical mu-

sic, on which the sales are larger and more reliable and enduring than upon the class of popular music to which said "Little Cotton Dolly" belongs; and includes also a large percentage of operatic music, upon which also the sales are more reliable and enduring than upon the class of popular music. This affiant says that if the Q R S Company were obliged to pay on an average Ten Dollars ($10.00) for the right and privilege of making perforated rolls of each of the pieces which it carries in its catalog and of which it carries such rolls in stock and on sale, an interest charge of Five Per Cent. (5%) upon the capital sum of One Hundred Twenty Thousand Dollars ($120,000.00) which it would thereby be required to invest in said business would absorb the entire profits and would be absolutely prohibitive of the continuance of said business.

This affiant further says that in view of the short life or limited period of salability of a large percentage of perforated rolls for the music carried in stock and in catalog, it is necessary, in order to maintain the volume of business without diminution from month to month and from year to year, to continually add new pieces to the catalog and stock; that the total amount of such pieces necessary in order merely to maintain the business at its present volume without increase is about One Thousand (1000) pieces per annum, and that since this number of additions would merely offset the number of pieces during the same period becoming dead or unsalable, if it were necessary to pay Ten Dollars ($10.00) for the right or privilege of making perforated rolls for each of these additional pieces the amount thus required,- Ten Thousand Dollars ($10,000.00) per annum,- would be substantially of the nature of expense to be charged against the gross profits of the business; and this affiant says that such a charge alone, without the interest charge above mentioned, would be absolutely prohibitive because it would exceed the entire profits, and would compel the suspension of said business.

From this method of calculation as to the maximum possible value of a piece of average popularity and salability, such as "Little Cotton Dolly", this affiant is clearly and positively of the opinion that such right or privilege would not be worth to exceed the sum of Five Dollars ($5.00) to the Q R S Company, and that it is very doubtful whether said Company could continue in business if even that low basis of valuation were applied to all the pieces for which it makes perforated rolls and corresponding prices exacted for such privilege.

This affiant further says that the value of said right or privilege to the Apollo Company of New York is, and at all times since the commencement of this suit has been, altogether nominal and not to exceed One Dollar ($1.00).

This affiant further says that he has just completed a careful examination of the records of cuttings of perforated rolls of "Popular" music of the Q R S Company with respect to the number of rolls cut of the most popular and salable pieces, and he finds that the total number of rolls cut for any piece of "Popular" music in the entire business of the Q R S Company has not exceeded Five Hundred (500) rolls, with one single exception, and in the case of that single exception the total number of rolls cut was One Thousand One Hundred Eighty (1180), the piece having a popular run from December, 1902, to about one year ago,- that is to say, nearly four years;- and that the average number of rolls cut of the five best selling pieces, excluding the one above mentioned, is Three Hundred Forty-Three (343) rolls, of which the average number on hand is Twenty three, and of which the average number sold and otherwise disposed of is Three hundred twenty.

Further affiant saith not. E. J. Clark

Subscribed and sworn to before me this 7th day of September, 1907.

John T. Bowles, Notary Public.

My Commission expires June 16-1909

(8) John T. Bowles

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D., 1907.

WHITE-SMITH MUSIC PUBLISHING CO.,
Appellant,
vs.
THE APOLLO COMPANY,
Appellee.

Appeal from United States Circuit Court of Appeals, Second Circuit.

No. 110

STATE OF ILLINOIS,
)SS.
COUNTY OF COOK.

ALBERT M. PAGE, being first duly sworn, deposes and says that he is the Secretary of the Melville Clark Piano Company; that he has been for six years past connected and familiar with the department of the business of said Melville Clark Piano Company which consists in handling automatic musical instruments and perforated controlling sheets for the same, sometimes called music rolls or perforated rolls; that he is familiar with the piece of music known as "Little Cotton Dolly", and with the so-called perforated rolls with which the above entitled suit is concerned, made by the Q R S Company of Chicago and De Kalb, Illinois, for playing said piece of music by means of automatic players.

This affiant further says that the said "Little Cotton Dolly" perforated rolls are manufactured by the Q R S Company of Chicago, Illinois, at its factory at De Kalb, Illinois, and that this affiant's said Company, the Melville Clark Piano Company, handles and markets without profit to itself the entire output of perforated rolls of said Q R S Company, and has handled and marketed the same ever since the commencement of business of said Q R S Company, and that the catalog of the rolls manufactured by said Q R S Company is issued and published as the catalog of the said Melville Clark Piano Company and contains a list of all the rolls made by said Q R S Company;

that said catalog is furnished to the retail dealers in automatic musical instruments and perforated rolls who are customers of the Melville Clark Piano Company, and that such catalogs have been furnished continuously to the Apollo Company of New York, defendant appellee in said suit, throughout the entire period of business of said Company down to the present time; that the price of said "Little Cotton Dolly" perforated roll is plainly published in said catalog at One Dollar and Eighty Cents ($1.80), and that this affiant believes that in view of such published price it would be practically impossible for the said Apollo Company to have sold any of said rolls at a higher price than One Dollar and Eighty Cents ($1.80) each; that said rolls were furnished to said Apollo Company by the Melville Clark Piano Company at Sixty Cents (60¢) each.

This affiant further says that the said Apollo Company of New York, during the entire period of its existence down to the present time, has handled not more than one-tenth (1/10) of the entire output of the Q R S Company; that this affiant is well informed as to the general course of business of said Apollo Company of New York, and knows substantially the expense involved in handling said perforated rolls at retail, and believes that the percentage of profit to said Apollo Company of New York upon the sales of said perforated rolls does not materially exceed one-fourth (1/4) of the retail price of said rolls.

This affiant further says that the worth or value to said Apollo Company of New York of the right or privilege of selling said perforated rolls, or the rolls for any particular piece of music in said catalog in its retail business, is not

more than one-fifth (1/5) of the worth or value to the producing Company (said Q R S Company) of the like right and privilege for the wholesale business of such producing Company.

This affiant further says that the said piece of music, "Little Cotton Dolly", belongs to a class of music commonly called "Popular", so called in distinction from certain other classes, such as Classical Music, Sacred Music, Operatic Music, Orchestral Arrangements, etc.; that the period of salability of the perforated rolls for playing any particular piece of music of said class of Popular music is on the average very short, said music being what is commonly termed "short lived", and that the period of salability of the perforated rolls for playing such Popular music seldom exceeds one year, and that a very large portion amounting to eighty per cent. (80%) of the sales of such rolls are made within six months from the date of the first introduction of the same in the market, and that sales fall off very rapidly if they continue at all beyond the period of six months, and become rare and only occasional after one year from date of first introduction; and that with the exception of a very few pieces of exceptional popularity, or which have been exploited and advertised by exceptional means, the demand for such rolls after the first year following their first introduction does not cover the cost of handling and keeping them in stock.

This affiant further says that said piece of music, "Little Cotton Dolly", is in no respect above the average of the class of Popular music in popularity or in the salability of its perforated rolls, and in fact, according to the actual experience of the Melville Clark Piano Company in handling said rolls, the salability of said perforated rolls is below the average of the entire class of popular music to which it belongs.

This affiant further says that of all the pieces for which the Q R S Company has cut and the Melville Clark Piano Company has handled perforated rolls for "Popular" music during the entire business of said Companies, there is only one of which the sale of rolls has amounted to more than Five Hundred (500), and that of the five next best selling pieces, the average number of rolls sold is only three hundred-twenty (320) and that the average sale of perforated rolls of the entire class of "Popular" music during the entire business of said Companies has not been more than One Hundred (100) rolls of each piece, and that the total actual sales of said "Little Cotton Dolly" perforated rolls during the entire period during which they have been catalogued by the Melville Clark Piano Company, from the date when they were first put on the market by the Melville Clark Piano Company down to the present time, has amounted to only Sixty-four (64) rolls at Sixty cents (60¢) per roll, and that the gross amount of sales of said rolls to the present date has been less than Forty Dollars ($40.00); and that for more than three years past, although said "Little Cotton Dolly" has been retained in the catalogs of the Melville Clark Piano Company, and the perforated rolls for the same have been kept in stock and subject to order, there has been no selling demand whatever for said rolls; that said "Little Cotton Dolly" perforated rolls were first put on the market in January, 1902, and that of said total sales of Sixty-four (64) rolls above mentioned, fifty-six (56) rolls were sold before the close of the year 1902, and only eight (8) rolls were sold thereafter down to the present time. This affiant further says that no sales of "Little Cotton Dolly" perforated rolls (except one roll which this affiant believes was called for for use in connection with this litigation) have been made since the year 1903, and

and that the sales of said rolls made prior to the year 1904 substantially exhausted the salability to the customers and trade reached by the Melville Clark Piano Company of said "Little Cotton Dolly" perforated rolls.

This affiant further says that the entire worth and value to the Melville Clark Piano Company and the producing Company (the Q R S Company) of the right or privilege of making and selling said "Little Cotton Dolly" perforated rolls has not been and is not more than some comparatively small fraction of said sum of Forty Dollars ($40.00) which constitutes the gross amount of actual sales of said rolls; this affiant says that said producing Company would not at any time have been warranted as a matter of business in paying any more than a nominal sum not exceeding ten per cent. (10%) of the gross sales above mentioned for the right or privilege of making and selling "Little Cotton Dolly" perforated rolls.

This affiant further says that the worth and value to the Apollo Company of New York of the privilege or right of sale of the "Little Cotton Dolly" perforated rolls in its business could not exceed such mere nominal sum of one-fifth (1/5) of the above estimated value of said right or privilege to said producing Company.

Further affiant saith not.

Albert S. Page

Subscribed and sworn to before me
this 7th day of September, 1907.

E. F. Clark Jr.
Notary Public.

E. F. CLARK JR. NOTARY PUBLIC COOK COUNTY, ILL.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1907.

White-Smith Music Publishing Company, Appellant, vs. The Apollo Company, Appellee.	On Appeal from the United States Circuit Court of Appeals, Second Circuit.

No. 110

State of Illinois,)
) SS.
County of Cook.)

E. B. BARTLETT, being first duly sworn, deposes and says that he is the Secretary of the W. W. Kimball Company, which is engaged in the manufacture of musical instruments at Chicago, Illinois; that one department of the business of said Company consists in the manufacture and sale of automatic musical instruments and piano players and in the manufacture and sale of perforated controller sheets or rolls for such instruments; that in his capacity as the Secretary of said Company he has been obliged to become, and has become, familiar with all phases of the business of making and marketing such perforated controller sheets, commonly called perforated rolls or music rolls, and is familiar both with the cost of production and with the prices obtained for such rolls and with the conditions of the business which affect the profit obtainable on such rolls and the value of the right or privilege of making such rolls for musical compositions of various classes.

Affiant further says that he is acquainted with the musical composition entitled "Little Cotton Dolly" and with the perforated rolls for producing the same upon automatic musical instruments, which are the subject matter of this suit.

This affiant further says that there is no custom or usage of the business by reference to which the value of said right or privilege with respect to any particular composition could be calculated; that except as to an occasional rare and exceptionally popular composition, or one which has been exploited by public performance and other means of advertising, composers generally are willing to have perforated rolls for playing their compositions made without any compensation to them for the privilege, and makers of such perforated rolls can at all times have a full supply of such popular music for their catalogues without compensation, because composers generally are desirous of having their music exploited by means of automatic instruments using such perforated rolls.

This affiant further says that the said composition of "Little Cotton Dolly" is not an exceptional composition in respect to popularity for automatic playing, but belongs to the class mentioned of ordinary or average popularity in this respect and of which an abundant supply is at all times available for perforated roll purposes without compensation for the privilege of making or selling same.

This affiant further says that the average worth or value to a maker of such perforated rolls, of the right or privilege of making and selling same, - that is to say, the value of such right with respect to the average musical composition, or one having average popularity, and of which the perforated rolls would have average salability, - is a very small amount, and in fact is substantially nominal only, and this affiant says that Ten Dollars ($10.00) is more than the value of such right with respect to the average musical composition of the class to which "Little Cotton Dolly" belongs, and that if it were necessary for makers of perforated rolls to pay an average price of Ten Dollars ($10.00) for such right,

the entire profits of the business would be extinguished, and that price, on an average, would therefore be prohibitive. This affiant therefore says that while he cannot state a valuation of said right with respect to the "Little Cotton Dolly" composition, he is unqualifiedly of the opinion that the value of said right is less than Ten Dollars ($10.00).

This affiant further says that the period of popularity and salability of the perforated rolls for playing music of the class known as "Popular", including such pieces as "Little Cotton Dolly", seldom in any one locality exceeds six months; that only the exceptional or exceptionally exploited pieces last as long as one year; that during the second year after the first introduction, the sales, in the majority of instances, do not more than cover the expense of handling, and generally cease altogether after the second year, or, in the case of pieces of more than ordinary popularity, after the third year; and this affiant says, therefore, that the total number of sales of perforated rolls for any such piece made within the two or three years after its first introduction may safely and correctly be regarded as exhausting its salability, and that the entire profit which can be made by making and selling such rolls is made within the first two or three years, and any stock of such rolls remaining on hand at the end of two or three years has only the value of waste paper, and the right or privilege of selling them thereafter is therefore of absolutely no value.

Further affiant saith not.

E. B. Bartlett

Subscribed and sworn to before me this 7th day of September, A. D., 1907.

Karl E Rogers

Notary Public.

My commission expires Jan. 12, 1911

(3)

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, A. D., 1907.

WHITE-SMITH MUSIC PUBLISHING CO.)
Appellant,)
vs.) Appeal from United States
) Circuit Court of Appeals,
THE APOLLO COMPANY,) Second Circuit.
Appellee.)

No. 111

STATE OF ILLINOIS,)
)SS.
COUNTY OF COOK.)

ERNEST G. CLARK, being first duly sworn, deposes and says that he is familiar with the perforated paper-controlling sheets, commonly called music rolls or perforated rolls, made and used for the purpose of playing automatically upon a piano the piece of music known as the "Kentucky Babe Schottische", and which is involved in controversy in the above entitled suit; that the perforated roll, Complainant's Exhibit No. 12 in said suit, and others like it, were made by the Q R S Company, a corporation of the State of Illinois, having its office at Chicago, Illinois, and factory at De Kalb, Illinois; that this affiant is its President and has been its President since its organization, and during the entire period of the operation of said Company has had practical charge of its affairs, both in the manufacturing and distributing of its products.

This affiant says that the perforated rolls made by said Company for playing "Kentucky Babe Schottische", of which the Complainant's exhibit No. 12 is one, are designated by said Q R S Company in its catalog and accounts as No. 3192; and that all the perforated rolls made by said Q R S Company for playing said music entitled "Kentucky Babe Schottische" are known and numbered as No. 3192, and that the entire number of such "Kentucky Babe Schottische" rolls No. 3192 which said

Q R S Company has ever made, up to this time, amount to one hundred fifty (150) rolls and no more.

This affiant further says that the records of said Q R S Company, kept under the direction of and now in the custody and control of this affiant, show all the sales and deliveries of said "Kentucky Babe Schottische" rolls, and that the total number of rolls sold and delivered, or in any manner furnished to any parties. from the date of the first cutting of said rolls down to the present time, is ninety-eight (98) rolls and no more, and that of said ninety-eight (98) rolls thirty-eight (38) rolls were sent to foreign countries and only sixty (60) rolls were sold or delivered for use in the United States; and that said Q R S Company has now on hand remaining unsold twenty-four (24) out of said one hundred fifty (150) rolls of "Kentucky Babe Schottische" No. 3192, and that the remaining twenty-eight (28) rolls out of said total of one hundred fifty (150) are accounted for as defective and discarded and thrown into waste paper upon inspection immediately after cutting by reason of flaws in the paper and short lengths, and as otherwise injured by handling in stock. and as used up in exhibiting players in the sales-room.

This affiant further says that upon the orders of the Melville Clark Piano Company said Q R S Company has furnished and sent to the Apollo Company of New York twelve (12) of said "Kentucky Babe Schottische" rolls No. 3192, which were forwarded to said Apollo Company at or about the following dates respectively:-

April	22, 1901,	1 roll;
June	11, 1902,	4 rolls;
Nov.	20, 1902,	4 rolls;
Oct.	31, 1903,	2 rolls;
May	21, 1904,	1 roll.
	Total,	12 rolls.

and this affiant says that said twelve (12) rolls constitute the entire number of such "Kentucky Babe Schottische" rolls which have ever been furnished or sent directly or indirectly to said Apollo Company of New York by said Q R S Company.

And this affiant further says that the price at which said "Kentucky Babe Schottische" rolls No. 3192 were sold to said Apollo Company of New York was forty cents (40¢) each, and that the manufacturing cost of said rolls, including boxing, was about twenty-five cents (25¢) each, and that all of said rolls were furnished boxed in the manner of said Complainant's Exhibit No. 12.

This affiant further says that the retail selling price of said "Kentucky Babe Schottische" rolls No. 3192 was plainly published in the catalog of such rolls furnished to said Apollo Company, and that the retail price so published was One Dollar and Twenty Cents ($1.20) each.

This affiant further says that he is familiar with the method and course of business of the Apollo Company of New York and with the general range and character of the expense involved in carrying on said retail business, and particularly in the sale of perforated rolls, and that according to his best information and belief the margin of profit to said Apollo Company of New York per roll, during the entire period of the sale of such rolls, was about double that of the Q R S Company on the same rolls, and that said Apollo Company has during said period handled not to exceed one-tenth (1/10) of the entire output of the perforated rolls of the Q R S Company, and that therefore the value to the Apollo Company of the right to sell such perforated rolls is not, and has not been at any time, more than one-fifth (1/5) the value to the Q R S Company of the right to make and sell the same rolls.

This affiant further says that there is no usage or custom of the business by means of which to calculate the value

of the privilege in question with respect to any particular piece of music if such privilege has any commercial value, but the value of such right or privilege might be estimated in advance in either one of two ways.

First, by taking into account the probable total sales of such rolls based upon the average experience with respect to music of like class and equal popularity, and allowing a certain percentage upon such estimated probable sales, and in the opinion of this affiant, according to this method the value of the right or privilege could not in any case exceed ten per cent. (10%) of the estimated sales.

Second, by ascertaining what amount the business of making and selling such rolls could stand as an average price for all the compositions for which rolls are made and catalogued.

For the purpose of arriving at a valuation by the first method, this affiant says that the said piece of music, "Kentucky Babe Schottische", belongs to a class of so-called "popular" music, and that the popularity or salability of perforated rolls for said "Kentucky Babe Schottische" is not above the average of all pieces of that class.

This affiant says that very few pieces of music of that class continue to be in demand or salable to any considerable extent longer than one or two years, and that the average life or period of salability of perforated rolls for such music for any one locality seldom exceeds a single season or period of six months; that inquiries for and sales of such rolls after the first six months from their introduction, except in case of a few of rare and exceptional merit and popularity, are only occasional; that such pieces frequently acquire popularity in a given locality, as on the Atlantic Coast, several months before they become known at all in more remote localities, so that a piece whose popularity has practically ceased at New York City may be acquiring its first popularity at San Francisco, and that the average period of salability of such pieces from the time of their earliest popularity at the lo-

cality where they are first introduced in the United States to the end of the period of profitable salability at the locality where they are last introduced in the United States does not ordinarily exceed one year.

This affiant further says that the average total number of rolls sold by the Q R S Company of any one composition of the class of "popular music" to which said "Kentucky Babe Schottische" belongs does not exceed one hundred fifty (150) rolls, and that in order to make an average so high as this, there must be included all the most popular rolls of that class; that of the rolls of average popularity, excluding a very small number of exceptional popularity, the average sale before their popularity ceases and they become unsalable does not exceed one hundred (100) rolls; that the total retail selling price of that number of rolls of the length of "Kentucky Babe Schottische" would be One Hundred Twenty Dollars ($120.00), the total price received by the Q R S Company, Forty Dollars ($40.00), and the valuation of said privilege upon the basis of ten per cent. (10%) of the total sales would be Four Dollars ($4.00).

This affiant further says that upon a basis of the percentage on the total sales, it is possible at the present date to arrive at the valuation of that right or privilege with respect to "Kentucky Babe Schottische" rolls without any uncertainty such as is involved in estimating in advance the probable sales; for this affiant says that the rolls for "Kentucky Babe Schottische" were first cut by Q R S Company in January, 1901; that it has been retained in the catalog subject to order and sale up to the present time, and that, with the exception of the one roll furnished to the Apollo Company of New York May 21, 1904, (which this affiant understands was called for by reason of this litigation and two rolls which were sent to Australia voluntarily, merely as a means of exhibiting players and not upon any order of customers) the

last order or request received by the Q R S Company for "Kentucky Babe Schottische" rolls was an order for one roll which was filed December 1, 1903, so that for a period of over three and one-half years while that piece has remained in the catalog there has been no demand for it.

This affiant therefore says that in his opinion the sales actually made, amounting, as above stated, to ninety-eight (98) rolls, exhausted the salability of said rolls; that the total profit made by the Q R S Company on the entire number of said rolls sold could not possibly have exceeded Fifteen Dollars ($15.00). The total value of the entire sales did not exceed Forty Dollars ($40.00), and on the basis of ten per cent. (10%) royalty, the total value, therefore, of the privilege did not exceed Four Dollars ($4.00).

If the Apollo Company of New York had sold at the full catalog price the entire number of said rolls which it received from the Q R S Company (twelve of said rolls), the total gross profits of said Apollo Company on said sales, making no deduction for the expense or cost of sale, would have been only Nine Dollars and Sixty Cents ($9.60), and the salability of said rolls being now ended, that sum less the cost of doing the business exceeds the total maximum value to that Company of the right or privilege of selling said rolls.

Upon the basis of the second suggested method of arriving at the valuation of said right or privilege,- viz., the amount that the business could stand as a lump price for such right,- this affiant says that the total number of pieces for which perforated rolls are made by the Q R S Company and carried in its catalog is about Twelve Thousand (12,000); that this number includes a large percentage of classical music, on which the sales are larger and more reliable and enduring than upon the class of popular music to which said "Kentucky Babe

Schottische" belongs; and includes also a large percentage of operatic music, upon which also the sales are more reliable and enduring than upon the class of popular music. This affiant says that if the Q R S Company were obliged to pay on an average Ten Dollars ($10.00) for the right and privilege of making perforated rolls of each of the pieces which it carries in its catalog and of which it carries such rolls in stock and on sale, an interest charge of five per cent. (5%) upon the capital sum of One Hundred Twenty Thousand Dollars ($120,000.00) which it would therefore be required to invest in said business would absorb the entire profits and would be absolutely prohibitive of the continuance of said business.

This affiant further says that in view of the short life or limited period of salability of a large percentage of perforated rolls for the music carried in stock and in catalog, it is necessary, in order to maintain the volume of business without dimunition from month to month and from year to year, to continually add new pieces to the catalog and stock; that the total amount of such pieces necessary in order merely to maintain the business at its present volume without increase is about One Thousand (1000) pieces per annum, and that since this number of additions would merely offset the number of pieces during the same period becoming dead or unsalable, if it were necessary to pay Ten Dollars ($10.00) for the right or privilege of making perforated rolls for each of these additional pieces, the amount thus required,- Ten Thousand Dollars ($10,000.00) per annum,- would be substantially of the nature of expense to be charged against the gross profits of the business; and this affiant says that such a charge alone, without the interest charge above mentioned, would be absolutely prohibitive because it would exceed the entire profits, and would compel the suspension of said business.

From this method of calculation as to the possible maximum value of a piece of average popularity and salability, as "Kentucky Babe Schottische", this affiant is clearly and positively of the opinion that such right or privilege would not be worth to exceed the sum of Five Dollars ($5.00) to the Q R S Company, and that it is very doubtful whether said Company could continue in business if that low basis of valuation were applied to all the pieces for which it makes perforated rolls and corresponding prices exacted for such privilege.

This affiant further says that the value of said right or privilege to the Apollo Company of New York is, and at all times since the commencement of this suit has been, altogether nominal and not to exceed One Dollar ($1.00).

This affiant further says that he has just completed a careful examination of the records of cuttings of perforated rolls of "Popular" music of the Q R S Company with respect to the number of rolls cut of the most popular and salable pieces, and he finds that the total number of rolls cut for any piece of "Popular" music in the entire business of the Q R S Company has not exceeded five hundred (500) rolls, with one single exception, and in the case of that single exception the total number of rolls cut was One Thousand One Hundred Eighty (1,180), the piece having a popular run from December, 1902, to about one year ago,- that is to say, nearly four years;- and that the average number of rolls cut of the five (5) best selling pieces, excluding the one above mentioned, is three hundred forty three (343) rolls, of which the average number on hand is Twenty three

and of which the average number sold and otherwise disposed of is Three Hundred Twenty.

Further affiant saith not.

E. G. Clark

Subscribed and sworn to before me this 7th day of September, 1907.

John T. Bowles,
Notary Public.

My Commission expires June 16-1909
John T. Bowles,

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, A.D., 1907.

WHITE-SMITH MUSIC PUBLISHING CO., Appellant,	)	
vs.	)	Appeal from United States Circuit Court of Appeals, Second Circuit.
THE APOLLO COMPANY, Appellee.	)	No. 111.

STATE OF ILLINOIS,)
) SS.
COUNTY OF COOK.)

ALBERT M. PAGE, being first duly sworn, deposes and says that he is the Secretary of the Melville Clark Piano Company; that he has been for six years past connected and familiar with the department of the business of said Melville Clark Piano Company which consists in handling automatic musical instruments and perforated controlling sheets for the same, sometimes called music rolls or perforated rolls; that he is familiar with the piece of music known as "Kentucky Babe Schottische", and with the so-called perforated rolls with which the above entitled suit is concerned, made by the Q. R. S. Company of Chicago and De Kalb, Illinois, for playing said piece of music by means of automatic players.

This affiant further says that the said "Kentucky Babe Schottische" perforated rolls are manufactured by the Q. R. S. Company of Chicago, Illinois, at its factory at De Kalb, Illinois, and that this affiant's said Company, the Melville Clark Piano Company, handles and markets, without profit to itself, the entire output of perforated rolls of said Q R S Company, and has handled and marketed the same ever since the commencement of business of said Q. R. S. Company, and that the catalog of the rolls manufactured by said Q. R. S. Company is issued and published as the catalog of the said Melville Clark Piano Company and con-

tains a list of all the rolls made by said Q. R. S. Company; that said catalog is furnished to the retail dealers in automatic musical instruments and perforated rolls who are customers of the Melville Clark Piano Company, and that such catalogs have been furnished continuously to the Apollo Company of New York, defendant appellee in said suit, throughout the entire period of business of said Company down to the present time; that the price of said "Kentucky Babe Schottische" perforated roll is plainly published in said catalog at One Dollar and Twenty Cents ($1.20), and that this affiant believes that in view of such published price it would be practically impossible for the said Apollo Company to have sold any of said rolls at a higher price than One Dollar and Twenty Cents ($1.20) each; that said rolls were furnished to said Apollo Company by the Melville Clark Piano Company at forty Cents (40¢) each.

This affiant further says that the said Apollo Company of New York, during the entire period of its existence down to the present time, has handled not more than one-tenth (1/10) of the entire output of the Q. R. S. Company; that this affiant is well informed as to the general course of business of said Apollo Company of New York, and knows substantially the expense involved in handling said perforated rolls at retail, and believes that the percentage of profit to said Apollo Company of New York upon the sales of said perforated rolls does not materially exceed one-fourth (1/4) of the retail price of said rolls.

This affiant further says that the worth or value to said Apollo Company of New York of the right or privilege of selling said perforated rolls, or the rolls for any particular piece of music in said catalog in its retail business, is not more than one-fifth (1/5) of the worth or value to the producing Company (said Q R S Company) of the like right and privilege for

the wholesale business of such producing company.

This affiant further says that the said piece of music, "Kentucky Babe Schottische", belongs to a class of music commonly called "Popular", so called in distinction from certain other classes, such as Classical Music, Sacred Music, Operatic Music, Orchestral Arrangements, etc.; that the period of salability of the perforated rolls for playing any particular piece of music of said class of Popular music is on the average very short, said music being what is commonly termed "short lived", and that the period of salability of the perforated rolls for playing such Popular music seldom exceeds one year, and that a very large portion amounting to eighty per cent. (80%) of the sales of such rolls are made within six months from the date of the first introduction of the same in the market, and that sales fall off very rapidly if they continue at all beyond the period of six months, and become rare and only occasional after one year from the date of first introduction; and that with the exception of a very few pieces of exceptional popularity, or which have been exploited and advertised by exceptional means, the demand for such rolls after the first year following their first introduction does not cover the cost of handling and keeping them in stock.

This affiant further says that said piece of music "Kentucky Babe Schottische", is in no respect above the average of the class of Popular music in popularity or in the salability of its perforated rolls, and in fact, according to the actual experience of the Melville Clark Piano Company in handling said rolls, the salability of said perforated rolls is below the average of the entire class of popular music to which it belongs.

This affiant further says that of all the pieces for which the Q. R. S. Company has cut and the Melville Clark Piano Company has handled perforated rolls for "Popular" music dur-

ing the entire business of said Companies, there is only one of which the sale of rolls has amounted to more than Five Hundred (500), and that of the five next best selling pieces the average number of rolls sold is only Three hundred twenty (320) and that the average sale of perforated rolls of the entire class of "Popular" music during the entire business of said Companies has not been more than One Hundred (100) rolls of each piece, and that the total actual sales of said "Kentucky Babe Schottische" perforated rolls during the entire period during which they have been catalogued by the Melville Clark Piano Company, from the date when they were first put on the market by the Melville Clark Piano Company down to the present time has amounted to only Ninety-Eight (98) rolls at Forty cents (40¢) per roll, and that the gross amount of sales of said rolls to the present date has been less than Forty Dollars ($40.00); and that for more than three years past, although said "Kentucky Babe Schottische" has been retained in the catalogues of the Melville Clark Piano Company, and the perforated rolls for the same have been kept in stock and subject to order, there has been no selling demand whatever for said rolls; that said "Kentucky Babe Schottische" perforated rolls were first put on the market in January, 1901, and that of said total sales of Ninety-Eight (98) rolls above mentioned, Eighty-One (81) rolls were sold before the close of the year 1902, and only seventeen (17) rolls were sold thereafter down to the present time. This affiant further says that no sales of "Kentucky Babe Schottische" perforated rolls (except one roll which this affiant believes was called for for use in connection with this litigation and two rolls which were sent to Australia to exhibit players) have been made since the year, 1903, and

and that the sales of said rolls made prior to the year 1904 substantially exhausted the salability to the customers and trade reached by the Melville Clark Piano Company of said "Kentucky Babe Schottische" perforated rolls.

This affiant further says that the entire worth and value to the Melville Clark Piano Company and the producing company (the Q R S Company) of the right or privilege of making and selling said "Kentucky Babe Schottische" perforated rolls has not been and is not more than some comparatively small fraction of said sum of Forty Dollars ($40.00) which constitutes the gross amount of actual sales of said rolls; this affiant says that said producing company would not at any time have been warranted as a matter of business in paying any more than a nominal sum not exceeding ten per cent. (10%) of the gross sales above mentioned for the right or privilege of making and selling "Kentucky Babe Schottische" perforated rolls.

This affiant further says that the worth and value to the Apollo Company of New York of the privilege or right of sale of the "Kentucky Babe Schottische" perforated rolls in its business could not exceed such mere nominal sum of one-fifth (1/5) of the above estimated value of said right or privilege to said producing company.

Further affiant saith not.

Albert M Page

Subscribed and sworn to before me
this 7th day of September, 1907.

Mabel E. Rogers
Notary Public.

My commission expires
Jan. 12, 1911

MABEL E. ROGERS NOTARY PUBLIC COOK COUNTY, ILLINOIS

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1907.

WHITE-SMITH MUSIC PUBLISHING COMPANY, Appellant, vs. THE APOLLO COMPANY, Appellee.	On Appeal from the United States Circuit Court of Appeals, Second Circuit.

STATE OF ILLINOIS,)
) SS.
COUNTY OF COOK.)

E. B. BARTLETT, being first duly sworn, deposes and says that he is the Secretary of the W. W. Kimball Company, which is engaged in the manufacture of musical instruments at Chicago, Illinois; that one department of the business of said Company consists in the manufacture and sale of automatic musical instruments and piano players and in the manufacture and sale of perforated controller sheets or rolls for such instruments; that in his capacity as the Secretary of said company he has been obliged to become, and has become, familiar with all phases of the business of making and marketing such perforated controller sheets, commonly called perforated rolls or music rolls, and is familiar both with the cost of production and with the prices obtained for such rolls and with the conditions of the business which affect the profit obtainable on such rolls and the value of the right or privilege of making such rolls for musical compositions of various classes.

Affiant further says that he is acquainted with the musical composition entitled "Kentucky Babe Schottische" and with the perforated rolls for producing the same upon automatic musical instruments, which are the subject matter of this suit.

This affiant further says that there is no custom or

usage of the business by reference to which the value of said right or privilege with respect to any particular composition could be calculated; that except as to an occasional rare and exceptionally popular composition, or one which has been exploited by public performance and other means of advertising, composers generally are willing to have perforated rolls for playing their compositions made without any compensation to them for the privilege, and makers of such perforated rolls can at all times have a full supply of such popular music for their catalogues without compensation, because composers generally are desirous of having their music exploited by means of automatic instruments using such perforated rolls.

This affiant further says that the said composition of "Kentucky Babe Schottische" is not an exceptional composition in respect to popularity for automatic playing, but belongs to the class mentioned, of ordinary or average popularity in this respect, and of which an abundant supply is at all times available for perforated roll purposes without compensation for the privilege of making or selling same.

This affiant further says that the average worth or value to a maker of such perforated rolls, of the right or privilege of making and selling same, - that is to say, the value of such right with respect to the average musical composition, or one having average popularity, and of which the perforated rolls would have average salability, - is a very small amount, and in fact is substantially nominal only, and this affiant says that Ten Dollars ($10.00) is more than the value of such right with respect to the average musical composition of the class to which "Kentucky Babe Schottische" belongs, and that if it were necessary for makers of perforated rolls to pay an average price of Ten Dollars ($10.00) for such right, the entire profits of the business would be extinguished,

and that price, on an average, would therefore be prohibitive. This affiant therefore says that while be cannot state a valuation of said right with respect to the "Kentucky Babe Schottische" composition, he is unqualifiedly of the opinion that the value of said right is less than Ten Dollars ($10.00).

This affiant further says that the period of popularity and salability of the perforated rolls for playing music of the class known as "Popular", including such pieces as "Kentucky Babe Schottische", seldom in any one locality exceeds six (6) months; that only the exceptional or exceptionally exploited pieces last as long as one year; that during the second year after the first introduction the sales, in the majority of instances, do not more than cover the expense of handling, and generally cease altogether after the second year -- or in the case of a piece of more than ordinary popularity after the third year; and this affiant says, therefore, that the total number of sales of perforated rolls for any such piece made within the two or three years after its first introduction may safely and correctly be regarded as exhausting its salability, and that the entire profit which can be made by making and selling such rolls is made within the first two or three years, and any stock of such rolls remaining on hand at the end of the third year has only the value of waste paper, and the right or privilege of selling them thereafter is therefore of absolutely no value.

Further affiant saith not. E. B. Bartlett

Subscribed and sworn to before me this 7 day of Sept, 1907.

Mabel E. Rogers.

Notary Public.
My commission expires
Jan. 12, 1911

MABEL E. ROGERS NOTARY PUBLIC COOK COUNTY, ILLINOIS

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1907.

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WHITE-SMITH MUSIC PUBLISHING CO.,

Appellant,

- vs. -

APOLLO COMPANY,

Appellee.

Appeal from United States Circuit Court of Appeals, Second Circuit.

Nos. 110 and 111.

-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-x

STATE OF New York :
COUNTY OF Kings :

ADOLPH L. JANSON, being first duly sworn, deposes and says, that from April 1900, until April 1905, he was in the employ of the Apollo Company at New York, defendant Appellee in the above entitled suits in the capacity of cashier and bookkeeper; that in that capacity he had full charge of the receipt and checking of goods, and that all invoices for goods received passed through his hands and their contents were noted and checked against the goods as they arrived; that he had general charge and supervision of the files, books and records of account and merchandise of said Apollo Company; that he is acquainted with the perforated controller sheets commonly called "music rolls" for controlling the operation of automatic piano players which were handled by said Apollo Company, and that he is familiar with the music rolls entitled respectively "Kentucky Babe Schottische" and "Little Cotton Dolly" which were contained in the catalogues of said Apollo Company as No. 3192 and No. 4559, respectively, one of which is Complainant's Exhibit# 12 in the above entitled suits respectively.

This affiant further says that during the entire time of his employment with the said Apollo Company the said Apollo

Company handled no other perforated controller sheets or music rolls except those which were manufactured by the Q R S Company of Chicago, and that all such music rolls handled by the Apollo Company were furnished to said Apollo Company through the Melville Clark Piano Company of Chicago.

This Affiant further says that the entire number of rolls No. 4559 entitled "Little Cotton Dolly" received by said Apollo Company during this Affiant's employment with said Company amounted to only eighteen (18) rolls, which were received by the Apollo Company from the Melville Clark Piano Company of Chicago and billed by said Melville Clark Piano Company to said Apollo Company upon invoices as follows:

Invoice dated	Feb. 13, 1902,	1	roll;
" "	Mar. 15, 1902,	2	"
" "	Apr. 26, 1902,	6	"
" "	May 28, 1902,	8	"
" "	Nov. 2, 1904,	1	"

and that the entire number of rolls No. 3192, entitled "Kentucky Babe Schottische," received by said Apollo Company during this Affiant's said employment with said Company amounted to only twelve (12) rolls, which were received by said Apollo Company from the Melville Clark Piano Company and billed by said Melville Clark Piano Company to said Apollo Company upon invoices as follows:

Invoice dated	Apr. 22, 1901,	1	roll;
" "	June 11, 1902,	4	"
" "	Nov. 20, 1902,	4	2
" "	Oct. 31, 1903,	2	"
" "	May 24, 1904,	1	"

This Affiant further says that at the time this Affiant left the employ of said Apolly Company, in April 1905, there were still remaining on hand and unsold in the stock of said Apollo Company nine (9) of said "Kentucky Babe Schottische" rolls No. 3192 and ten (10) of said "Little Cotton Dolly" rolls No. 4559.

(asf)
(asf)

This Affiant further says that there was no system or method in use by said Apollo Company during the years of this Affiant's employment by said Company for causing to appear

upon its books of account or records the titles or numbers of the particular rolls which were sold from time to time, and that this Affiant has no knowledge, and has at no time had any knowledge, of any actual sales of said "Little Cotton Dolly" rolls by said Apollo Company; but from the above stated facts within this Affiant's knowledge that only twelve (12) of said "Kentucky Babe Schottische" rolls and only eighteen (18) of said "Little Cotton Dolly" rolls were at any time received by said Apollo Company during this Affiant's employment with said Company, and that nine (9) rolls of said "Kentucky Babe Schottische" and ten (10) rolls of said "Little Cotton Dolly" rolls remained unsold, this Affiant is able to declare positively that the total number of said rolls sold by said Apollo Company during the period of this Affiant's employment by said Company could not have exceeded three rolls of "Kentucky Babe Schottische" and eight (8) rolls of said "Little Cotton Dolly."

This Affiant further says that the pendency of the above entitled suits had some effect in preventing special mention of said "Kentucky Babe Schottische" and "Little Cotton Dolly" to customers during the latter part of the year 1902 and the year 1903, and that, in his opinion, sales of the perforated rolls for each of said pieces would have been somewhat greater than they were but for this cause, but that the total number of said rolls purchased by the said Apollo Company, namely, eighteen (18) rolls of "Little Cotton Dolly" and twelve (12) rolls of "Kentucky Babe Schottische" were all that there is or was any reason to believe could possibly have been sold or used in any manner under the most favorable circumstances.

This Affiant further says that the retail selling price of said "Kentucky Babe Schottische" rolls was one dollar

and twenty cents ($1.20) per roll and of the "Little Cotton Dolly" rolls, one dollar and eighty cents ($1.80) per roll, and that these prices were distinctly shown in the catalogue, and that it would have been practically impossible for any of said rolls to have been sold for higher prices than said catalogue prices, respectively.

This Affiant further says that the cost of said rolls to the Apollo Company was one-third (1/3) of said catalogue prices, to wit, forty ($.40) cents each for said "Kentucky Babe Schottische" rolls and ~~forty~~ sixty ($.60) cents each for said "Little Cotton Dolly" rolls.

This Affiant further says that he has made a very careful computation of the profits made by the said Apollo Company of New York on its sales of said perforated rolls during the entire period when the same were being sold, to wit, the years 1902, 1903, 1904, and that such profit amounted to not above ten (10%) per cent. of the retail price of the rolls sold; that, in arriving at this result, all rolls given ~~xxx~~ away to purchasers of musical instruments as inducement to such purchase, are counted as if sold for cash at the full catalogue prices of said rolls, and that full account is made of all receipts derived from the customary fee for "Privileges of Library" which receipts this Affiant says are about sufficient to cover the value of rolls required for replenishing the Library and for rolls worn out in use and becoming dead and entirely out of demand.

This Affiant further says that the said "Kentucky Babe Schottische" and said "Little Cotton Dolly" compositions both ~~applied~~ belong to a class of music commonly called and in said catalogue listed as "Popular," and from seven years' experience in dealing in perforated rolls for automatic playing, this Affiant says that the ordinary life or period of profitable

salability of perforated rolls for such music as "Kentucky Babe Schottische" and "Little Cotton Dolly" does not exceed from six months to one year; that only in very rare instances of pieces of remarkable popularity does the salability of the rolls extend beyond eighteen months, and that after that length of time the rolls are called for so rarely that it does not pay to keep them on the shelves. And this Affiant says that the said "Kentucky Babe Schottische" and said "Little Cotton Dolly" are not, nor is either of them, above the average of "popular" music in respect to popularity or salability of the perforated rolls for playing said pieces, and that the value of the privilege of selling such rolls, if said privilege in any case would have any commercial value, is properly to be ascertained by computation based upon the sales during a period not exceeding two years from the first introduction, or, if arrived at in advance of such sales, by computation based upon estimated sales for such period not exceeding two years; and that so far as the value of said right to the Apollo Company of New York is concerned, the total sales as hereinbefore stated, amounting to three (3) rolls of "Kentucky Babe Schottische" and to eight (8) rolls of "Little Cotton Dolly," which were sold during the entire period from April 1902, to April 1905, would not warrant the payment of any price whatever for such privilege.

This Affiant further says that in accordance with all his experience and observation with respect to the period of salability of perforated rolls for the class of music to which said "Kentucky Babe Schottische" and "Little Cotton Dolly" belong, this Affiant believes that the salability of said rolls has long since ceased, and that the profits which might have been made by said Apollo Company upon the total number of such rolls purchased by said Company as above stated, would

Original Map

be the maxiumum amount of profits which said Company could in any event derive however long their right or privilege of selling same might continue.

Further Affiant saith not.

Adolph L. Jansen

Subscribed and sworn to before me this 13th day of September, 1907.

Julius Lehrenkrauss

Notary Public

Kings County.

N.Y. No. 103.

62-2-'06.-5M.-J. C.

State of New York, } ss.
COUNTY OF KINGS,

I, **CHARLES T. HARTZHEIM,** CLERK OF THE COUNTY OF KINGS, and also CLERK OF THE SUPREME COURT for said County (said Court being a Court of Record), DO HEREBY CERTIFY that Mr.

Julius Lehrenkrauss

before whom the annexed deposition was taken, was at the time of taking the same a NOTARY PUBLIC in and for said County, dwellining in said County, commissioned and sworn and authorized to administrate oaths for general purposes. And further, that I am well acquainted with the handwriting of such Notary, and verily believe the signature to the said deposition is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said County and Court, this 13 day of Sept 190

Chas. T. Hartzheim Clerk

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D., 1907.

WHITE-SMITH MUSIC PUBLISHING CO., Appellant,	)	Appeal from United States
vs.	)	Circuit Court of Appeals,
	)	Second Circuit.
APOLLO COMPANY, Appellee.	)	Nos. 110 and 111.

STATE OF NEW YORK,)
) SS.
COUNTY OF NEW YORK.)

FRED KANN, being first duly sworn, deposes and says that he has heretofore made an affidavit in the above entitled matter, which was dated and sworn to September 12, 1907; that since making said affidavit, his attention has been called to invoices of perforated rolls, from the Melville Clark Piano Company to the Apollo Company, for "Kentucky Babe Schottische" and "Little Cotton Dolly", as follows:-

Oct. 31, 1903, 2 rolls, Kentucky Babe Schottische;
May 24, 1904, 1 roll, " " "
Nov. 2, 1904, 1 roll Little Cotton Dolly.

And this affiant says that in said former affidavit he did not take into account the four rolls mentioned in the above-mentioned invoices, because, this affiant says as a matter of fact, the rolls to which said invoices refer were never placed in the stock of the Apollo Company, but when received were understood to have been sent for some use in connection with the above-entitled suits and were laid aside in the expectation that they would be called for when wanted for said use, and that said four rolls were never offered for sale or kept in stock for sale by the Apollo Company. This affiant does not know what became of said four rolls.

Affiant further says that the Apollo Company still has on hand seven(10) "Little Cotton Dolly" rolls, and nine(9)

"Kentucky Babe Schottische" rolls, and that none of them are kept with stock for sale, said rolls being now regarded as wholly unsalable.

Further affiant saith not.

Fred Mann

Subscribed and sworn to before me

this 20 day of Sept., 1907.

Robt. O'Brien

Notary Public, N.Y.Co.

Reg. office 2747

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Fol. 1

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1907.

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WHITE-SMITH MUSIC PUBLISHING CO.,

Appellant,

- vs. -

APOLLO COMPANY,

Appellee.

Appeal from United States Circuit Court of Appeals, Second Circuit.

Nos. 110 & 111

-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-x

STATE, CITY AND COUNTY OF NEW YORK: ss.:

FRED ~~[illegible]~~ KANN, being first duly sworn, deposes and says, that he is the manager of the Apollo Company, of New York, having its place of business at 44 West 34th Street, New York City, the defendant-appellee in the above entitled suit; that he has had charge of the business of said Apollo Company as manager since the 10th day of October 1903

2 to the present time. That part of the business of said Apollo Company consists in dealing in perforated controlling sheets, commonly called music rolls, for automatic musical instruments; that the only perforated rolls handled by said Apollo Company are those manufactured by the Q. R. S. Company, of Chicago, Illinois, and that all said Q. R. S. Company rolls obtained by said Apollo Company are obtained through Melville Clark Piano Company, of Chicago, Illinois, and that the catalogue of the Q. R. S. Company rolls, by reference to which all orders for the said rolls are made by the customers of said Apollo Company, are issued as the catalogues of the Melville Clark Piano

3 Company; that in said catalogue and in the books, accounts and orders of the said Apollo Company, the perforated rolls or music rolls for playing the piece of music entitled "Little Cotton Dolly" are known as No. 4559, and that the music rolls

for playing the musical composition entitled "Kentucky Babe Schottische" are known as No. 3192.

This affiant further says that the said Apollo Company has not bought or received any xxxx of said "Kentucky Babe Schottische" rolls No. 3192 nor any of said "Little Cotton Dolly" Rolls No. 4559, nor any perforated rolls whatever for playing either of said pieces of music during the entire period during this affiant's connection with said company.as manager thereof, and that said Company has not during said period sold, given away or in any manner disposed of any xxxxxxxxxxxx of said "Kentucky Babe Schottiche" rolls No. 3192 nor any of said "Little Cotton Dolly" rolls No. 4559, nor any perforated rolls whatever for playing either of said pieces of music; and that to the best of affiant's knowledge and belief there has been no call whatever from the customers of said Apollo Company for either of said rolls, unless for the purposes of this suit, during the said period of this affiant's connection with said Company as said manager.

And further this affiant sayeth not.

Subscribed and sworn to before me :
this 17 day of September, 1907. :

Robt. R. Greason
NOTARY PUBLIC, N. Y. CO.

Reg. office 2743

ROBT. R. GREASON
NOTARY PUBLIC
NEW YORK COUNTY

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1907.

White-Smith Publishing Co., Appellant. vs. Apollo Company, Appellee.) Appeal from United States Circuit Court of Appeals, Second Circuit.

Nos. 110 + 111

State of New Jersey)
) SS.
County of Essex.)

G. HOWLETT DAVIS, being first duly sworn, deposes and says that he resides at Orange, New Jersey; that for fifteen years last past he has been connected with and engaged in the business of manufacturing automatic musical instruments and players and particularly with the manufacture of perforated controlling sheets, commonly called "music rolls" or "perforated rolls" for controlling the playing of such automatic instruments and players; that he is the treasurer and business manager of the Standard Music Roll Company of Orange, N. J. engaged in the manufacture of such perforated rolls; that during part of the years 1902 to 1906 inclusive and part of the present year 1907, he was connected with and active manager and factory superintendent of The Perforated Music Roll Company of New Jersey having factories at New York and at Schenectady in the State of New York and its chief business office at New York City, State of New York; that he is thoroughly familiar and for many years past has been thoroughly familiar with all departments and features of the business of manufacturing and disposing of such perforated rolls or music rolls, that he is and was through the entire period of his said connection with The Perforated Music Roll Company and for several years prior thereto, familiar with the demand and market for such music rolls and with the cost of production and with the conditions of the business affecting the prices and profit obtainable at wholesale and retail for the same, and affecting the value of the right or privilege of making such rolls for musical compositions of the various classes of music for which such rolls are used.

This affiant further says that he is acquainted with the musical compositions entitled "Kentucky Babe Schottische" and "Little Cotton Dolly" and with the perforated rolls for producing the same upon automatic musical instruments which are subject matter of above entitled suits.

This affiant further says that there is no custom or usage of the business by which the value of the right or privilege of making or selling such perforated rolls for any particular composition could be calculated; that except as to an occasional rare or exceptionally popular composition, or one which has been exploited by public performance or other means of advertising, composers generally are willing to have perforated rolls for playing their compositions of the class of "popular" music, made without any compensation to them for the privilege; and makers of such perforated rolls can at all times have a full supply of such popular music for their catalogues without compensation, because composers generally are desirous of having their music exploited or advertised by means of automatic instruments, using such perforated rolls; and that such has been the case throughout the entire period of this affiant's connection with said business and particularly during the years 1902 and following down to the present time.

This affiant further says that said compositions "Kentucky Babe Schottische" and "Little Cotton Dolly" are not exceptional compositions in respect to popularity for automatic playing, but that said compositions belong to the class above mentioned, of ordinary or average or less than average popularity for this purpose, and that they are compositions of which the perforated rolls would be expected to have only average salability, and that they are in this respect of the sort of which an abundant supply is at all times available to perforated roll makers for perforated roll purposes, without compensation for the privilege of making or selling such rolls.

This affiant further says that the period of popularity and salability of the perforated rolls for playing music of the class known as "Popular", including such pieces as "Kentucky Babe Schottische" and "Little Cotton Dolly", seldom in any one locality exceeds six months; that only the exceptional or exceptionally exploited pieces last in respect to salability as long as one year; that during the second year after their first introduction the sales, in majority of instances, do not cover more than the expense of handling, and that sales generally cease altogether after the second year, - or in the case of a piece of more than ordinary popularity, after the third year; and this affiant says therefore that the total number of sales of perforated rolls for any such piece made within two or three years after its first introduction may safely be counted and may correctly be regarded as exhausting its salability; and that the entire profit which can be made by making and selling such rolls is made usually within the first year and almost invariably within the first two years, and that any stock of such rolls remaining on hand at the end of the third year has only the value of waste paper and the right or privilege of selling them is therefore of absolutely no value.

This affiant further says that the average worth or value to a maker of such perforated rolls of the right or privilege of making or selling the same in the case of "Popular" musical compositions of average popularity for automatic playing and of which the perforated rolls for such playing would have average salability, is in any event a very small amount, even for the full period of popularity and salability. And this affiant says that while it is not possible to fix definitely the value of such privilege with respect to "Kentucky Babe Schottische" and "Little Cotton Dolly", this affiant is unhesitatingly of the opinion that such right or privilege with respect to either of said pieces was never worth so much as Ten Dollars ($10), for this affiant says that said pieces being of only average salability in perforated roll, could be not worth more

that the average of the entire class of "Popular" music to which they belong, and that an average charge of Ten Dollars ($10) for the privilege of cutting and selling perforated rolls for this class of music would extinguish the entire profits of the business and would therefore be absolutely prohibitive.

This affiant further says that the value of the right or privilege of cutting and selling perforated rolls for any particular piece of "Popular" music estimated on the basis of the aggregate sales of such rolls is in any event only a very small percentage of the profits made on such sales; for this affiant says that the lack of any particular piece from the catalogue or stock of the maker or dealer in perforated rolls does not entail the loss of sales to the number of rolls which would be sold of that particular piece if it were in stock or catalogue, but only the loss of the very small percentage of sales consisting of those which will be called for by customers desiring that particular piece and who would not be satisfied with any other piece of the same general character or appealing to the same taste; for this affiant says that the demand of customers in each instance of purchase of rolls is usually only for music of a certain sort or general character and that, lacking any particular piece of the character desired, they are satisfied with another piece of the same general character, so that each dealer sells to his customers the piece which he has in stock of the character sought for and does not lose the sale because he does not happen to have a particular piece which may have been mentioned; and this affiant says that the percentage of calls which could be satisfied only with a particular piece called for is very small indeed, and would not warrant any maker or dealer in perforated rolls in paying more than five percent or at the utmost ten percent on the net profit, which he could make on the sales of such rolls.

This affiant further says in his opinion the exclusive right or privilege of making or selling perforated rolls for any

piece of "Popular" music of ordinary or average popularity or of which the perforated rolls would have average salability, is worth no more to the maker or dealer in such rolls than the mere unexclusive privilege or permission to make or sell the same; because this affiant says that every maker and dealer in such rolls obtains many inquiries for and makes many sales of its own perforated rolls by reason of the sales of the rolls of other makers and dealers for the same music, causing the piece to be recommended by such purchasers to their acquaintances; and that the sales made from this cause are more than would be secured from the small percentage of the other manufacturers customers who would accept nothing less than the particular piece asked for and would thereby be compelled to buy it of the maker having the exclusive ~~prize~~ rights in respect to it.

With respect to the particular pieces mentioned "Kentucky Babe Schottische" and "Little Cotton Dolly" this affiant says that his Company, The Perforated Music Roll Company made and put on the market perforated rolls for said pieces at 75 cent each and 75 cent each respectively, or thereabouts, and that the salability of said rolls and the demand for the same was so far below the average or ordinary salability of rolls of that class of music that both said titles "Kentucky Babe Schottische" and "Little Cotton Dolly" were included in a list kept by said The Perforated Music Roll Company called "Bad Sellers" as distinguished from another list which said Company kept entitled "Preferred"; and that the sales of said "Kentucky Babe Schottische" and "Little Cotton Dolly" rolls substantially ceased and their salability was exhausted at least three years ago. This affiant says further that any ~~mx~~ composition of the class of "Popular" music, of which the rolls sold up to or near to the number of one hundred was considered a fair seller, and would not be classed as a "Bad Seller", and that the sales of neither of said pieces by The Perforated Music Roll Company amounted in the aggregate during the entire life or period of salability to as much as seventy-five rolls.

This affiant therefore says that the privilege of making and selling perforated rolls for "Kentucky Babe Schottische" or the like privilege with respect to "Little Cotton Dolly" is not now worth any sum whatever to any maker of perforated rolls or dealer therein; and that for the same reasons the exclusive right or privilege of making and selling such rolls for said pieces is at this time of absolutely no value; and the same is true without regard to the length of time in the future through which such privilege exclusive or non-exclusive might continue; because this affiant says that in all his fifteen years' experience in the making and handling of perforated rolls, there has never to his knowledge been an instance of revival or return of salability of the perforated rolls of a piece of music of which such rolls had passed through one period of salability and become "dead" or unsalable.

Stanley L. Davis

Subscribed and sworn to before me this
17th day of September 1907.

Raymond Bruce.
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

White-Smith Music Publishing Co. Appellant	
vs.	Nos. 110 and 111.
Apollo Company Appellee	

State of Massachusetts :
: ss.
County of Suffolk :

BANKS M. DAVISON, being duly sworn deposes and says as follows:

I am of mature age and reside in Boston, Mass., being Manager of Publications of the appellant herein and being the same Banks M. Davison whose depositions appear in the transcript of record herein.

I have now re-readsaid depositions and re-affirm them.

The matter in controversy in each of the aboye entitled suits was at the time of said depositionsand has continued ever since to be and is now in excess of $1000 and even in excess of $5000. The reasons that I gave for this assertion at the time of said depositions have continued true ever since and are true to-day and I refer to said depositions for such reasons. In addition to maintaining the validity and scope of the respective copyrights in suit

and the appellant's title thereto as alleged in the bill of complaint and in addition to the prayers for injunction thereunder, one of the objects of these suits was and is to obtain a decree for an accounting under which I am advised that the appellee will be compelled to account in the regular manner, both as to the extent of its infringement in every way, shape and form, directly and indirectly, and also as to the amount of recovery to the appellant thereon. When such accounting has been had, I believe the amount which complainant will thereby be shown as entitled to recover will exceed $1000 besides costs in each of these suits.

I understand that in its affidavits on motion to dismiss these appeals, appellant has undertaken to substitute ex parte affidavit statements as to the extent and form of its infringements in lieu of the accounting prayed for, but I do not believe that the conclusions stated in these affidavits in that regard are correct or that in the ascertainment of the true facts affidavits can be substituted for an accounting with justice to the appellant. So far as the statements of said affidavits are relevant to the support of this motion, I understand them to be fully refuted in my said depositions, which being given subject to cross examination, must be more satisfactory to the Court than any repetition thereof in the present affidavit.

In the testimony contained in the transcript of record at pages 163 and 164, are given the appellant's sales of the musical composition "Little Cotton Dolly" under the copyright in one of these suits down to June 1903, and at pages 286, 287 and 288, are given the appellant's sales of the musical composition "Kentucky Babe" under the other copyright herein suit down to the same date. For the purpose

of continuing the statement of these sales down to the present time, I have referred to the complainant's books and find that from June 4, 1903, until the present time, the complainant's sales of the copyrighted musical composition "Little Cotton Dolly" have amounted to more than 11700 copies, and of the copyrighted musical composition "Kentucky Babe" more than 35500 copies. Both of these copyrighted musical compositions still maintain their popularity and we are not experiencing any substantial falling off in the sales of either.

Banks M. Davison

Subscribed and sworn to before me
this ninth day of October 1907

Walter A. Stone.
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

White-Smith Music Publishing Co. Appellant	:	
vs.	:	
Apollo Company	:	Nos. 110 and 111.
Appellee	:	

County of Suffolk :
: ss:
State of Massachusetts :

WALTER M. BACON, being first duly sworn deposes and says as follows:

I am of mature age and reside in Boston, Massachusetts, and am Treasurer of the appellant herein. I am the same Walter M. Bacon whose depositions appear in the transcript of record herein.

I have now re-read said depositionsand re-affirm them. The matter in controversy in each of the above entitled suits was at the time of said depositionsand has continued ever since to be and is now in excess of $1000 and even in excess of $5000. The reasons that I gave for this assertion at the time of said depositions have continued true ever since and are true to-day and I refer to said depositions for such reasons. In addition to maintaining the validity and scope of the respective copyrights in suit and the appellant's title thereto as alleged in the bills of complaint and in addition to the prayers for injunction thereunder, one of the objects of each of these suits

was and is to obtain a decree for an accounting under which I am advised that the appellee will be compelled to account in the regular manner both as to the extent of its infringement in every way, shape and form, directly and indirectly, and also as to the amount of recovery to the appellant thereon. When such accounting has been had, I believe that the amount which complainant will thereby be shown as entitled to recover will exceed $1000 besides costs in each of these suits.

I understand that it in its affidavits on the motion to dismiss these appeals, appellee has undertaken to substitute ex parte affidavit statements as to the extent and form of its infringements in lieu of the accounting prayed for, but I do not believe that the conclusions stated in these affidavits in that regard are correct or that in the ascertainment of the true facts affidavits can be substituted for an accounting with justice to the appellant.

The affiants of appellee's affidavits in support of this motion all come from persons highly interested in defeating these suits. The three companies, Q.R S Co., Melville Clark Piano Co and Apollo Co. are, collectively, the real defendant in substance in this case; the infringements having passed through their hands as maker, seller and reseller. The affiants coming from these companies are E. G. Clark, A. M. Page, A. L. Janson and F. Kann.

The Perforated Music Roll Co. from whom come appellee's affiants W. F. Wallace and G. H. Davis, was, while it existed, a persistent infringer of patents as well as copyrights affecting musical compositions but was not a

commercial success and is now understood to be defunct. The W. W. Kimball Co. from which comes the remaining affiant, E. B. Bartlett, is another persistent infringer.

So far as the statements of said affidavits are relevant to support this motion, I understand them to be fully refuted in my said depositions to which I refer.

Walter A. Stone

Subscribed and sworn to before me this ~~ninth~~ day of October 1907

Walter A. Stone
Notary Public.

WALTER A. STONE NOTARY PUBLIC MASSACHUSETTS

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1907.

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WHITE-SMITH MUSIC PUBLISHING CO.,

Appellant,

vs.

APOLLO COMPANY,

Appellee.

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Appeal from United States Circuit Court of Appeals, Second Circuit.

Nos. 110 and 111.

Messrs. Gifford & Bull,

141 Broadway, New York,

Counsel for Appellant.

Gentlemen:

You are handed herewith copies of affidavits by Willard F. Wallace, G. Howlett Davis, and Ernest G. Clark (2), which you are hereby notified we shall ask leave of Court to file, and which, together with the affidavits served upon you on September 17th, 1907, and any counter-affidavits filed on behalf of the appellant we shall ask the Court to consider in connection with motions to dismiss the appeals in both said suits which will be hereafter entered for an early motion day in the coming October Term of said Court.

CHARLES S. BURTON,

Of Counsel for Appellee.

Received above notice and copies of affidavits therein mentioned at New York City, this 20th day of September, 1907.

Gifford & Bull

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1907.

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WHITE-SMITH MUSIC PUBLISHING COMPANY,

Appellant,

- vs. -

APOLLO COMPANY,

Appellee.

Appeal from United States Circuit Court of Appeals, Second Circuit.

Nos. 110 and 111.

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Messrs. Gifford & Bull,

141 Broadway, New York,

Counsel for Appellant.

Gentlemen:

You are handed herewith copy of affidavit by Fred Kann, which you are hereby notified we shall ask leave of Court to file, and which, together with the affidavits served upon you on September 17th, 1907, and September 20th, 1907, and any counter-affidavits filed on behalf of the appellant, we shall ask the Court to consider in connection with motions to dismiss the appeals in both said suits duly entered for the 21st day of October, 1907.

CHARLES S. BURTON,

Of Counsel for Appellee.

Received above notice and copy of affidavit therein mentioned at New York City, this 30th day of September, 1907.

Gifford & Bull

Counsel for appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D., 1907.

WHITE-SMITH MUSIC PUBLISHING CO., Appellant, vs. APOLLO COMPANY, Appellee.	)	Appeal from United States Circuit Court of Appeals, Second Circuit. Nos. 110 and 111.

STATE OF NEW YORK,)
) SS.
COUNTY OF NEW YORK.)

FRED KANN, being first duly sworn, deposes and says that he has heretofore made an affidavit in the above entitled matter, which was dated and sworn to September 12, 1907; that since making said affidavit, his attention has been called to invoices of perforated rolls, from the Melville Clark Piano Company to the Apollo Company, for "Kentucky Babe Schottische" and "Little Cotton Dolly", as follows:-

Oct. 31, 1903, 2 rolls, Kentucky Babe Schottische;
May 24, 1904, 1 roll, " " "
Nov. 2, 1904, 1 roll, Little Cotton Dolly.

And this affiant says that in said former affidavit he did not take into account the four rolls mentioned in the above-mentioned invoices, because, this affiant says as a matter of fact, the rolls to which said invoices refer were never placed in the stock of the Apollo Company, but when received were understood to have been sent for some use in connection with the above-entitled suits and were laid aside in the expectation that they would be called for when wanted for said use, and that said four rolls were never offered for sale or kept in stock for sale by the Apollo Company. This affiant does not know what became of said four rolls.

Affiant further says that the Apollo Company still has on hand Ten (10) "Little Cotton Dolly" rolls, and Seven (7)

"Kentucky Babe Schottische" rolls, and that none of them are kept with stock for sale, said rolls being now regarded as wholly unsalable.

Further affiant saith not.

Fred Hall

Subscribed and sworn to before me

this 30 day of Sept, 1907.

Robt. H. Clarkson

Notary Public. N.Y.Co

Reg. office 2747

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1907.

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WHITE-SMITH MUSIC PUBLISHING CO., :

Appellant, : Appeal from United States Circuit Court of Appeals, Second Circuit.

- vs. - :

APOLLO COMPANY, :

Nos. 110 and 111.

Appellee. :

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Messrs. Gifford & Bull,

141 Broadway, New York,

Counsel for Appellant.

Gentlemen:

You are handed herewith copies of affidavits by E. B Bartlett (2), A. X. Page(2), Adolf Janson and FredKann which you are hereby notified we shall ask leave of court to file, and which, together with any counter affidavits filed on behalf of the appellant we shall ask the court to considerin connection with motions to dismiss the appeals in both said suits which will be hereafter entered for an early motion day in the coming October term of said Court.

Chas. S. Burton,

of Counsel for Appellee.

Received above notice and copies of affidavits therein mentioned at New York City, this 17th day of September, 1907.

Gifford & Bull
Per Lang